LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
SEP 10 1970
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 67-2

October Term, 1970

* * *

JOE H. TONAHILL,

Petitioner

v.

THE UNITED STATES OF AMERICA,

Respondent

* * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

SANDER W. SHAPIRO
P. O. Box 1148
Austin, Texas 78767
A/C 512 472-8442
Counsel of Record

CLARK, THOMAS, HARRIS, DENNIS
& WINTERS

MARY JOE CARROLL
P. O. Box 1148
Austin, Texas 78767
A/C 512 472-8442
of Counsel

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions	3
Statement of the Case	4
Reasons for Granting the Writ	7
Conclusion	27
Appendix	
Opinion of the United States District Court for the Eastern District of Texas, Beaumont Division (308 F.Supp. 97 (E.D.Tex. 1970))	A-1
Order of the Court of Appeals for the Fifth Circuit Overruling Motion to Dismiss for Want of Jurisdiction	A-8
Judgment of the Court of Appeals for the Fifth Circuit	A-9
Opinions of the Court of Appeals for the Fifth Circuit	A-10
Order of the Court of Appeals for the Fifth Circuit Overruling Motion for Rehearing	A-15
United States v. Prudden, 424 F.2d 1021 (5th Cir. 1970)	A-16
Certificate of Service	A-45

CITATIONS

CASES:

	Page
Arrington v. Maxwell, 498 F.2d 849 (6th Cir. 1969)	12
Brooks v. American Brass Company, 263 F.2d 166 (6th Cir 1959)	23
Bumper v. State of North Carolina, 391 U.S. 543 (1968)	12
Byrd v. Lane, 398 F.2d 750 (7th Cir. 1968), cert. den., 393 U.S. 1020 (1968)	23
Carroll v. United States, 354 U.S. 397 (1957)	25
Charles Hughes & Company, Inc. v. Securities & Exchange Commission, 139 F.2d 434 (2nd Cir. 1943), cert. den., 321 U.S. 786 (1944)	21
Cohen v. United States, 405 F.2d 34 (8th Cir. 1968), cert. den., 394 U.S. 943 (1969)	18
Frohmann v. United States, 380 F.2d 832 (8th Cir. 1967)	16
Gouled v. United States, 255 U.S. 298 (1921)	20
Hoffa v. United States, 385 U.S. 293 (1966)	21
Howard v. Swenson, 404 F.2d 469 (8th Cir. 1968)	23
Jackson v. United States, 353 F.2d 862 (D.C.Cir. 1965)	23
Judd v. United States, 190 F.2d 649 (D.C.Cir. 1951)	13
Mapp v. Ohio, 376 U.S. 643 (1961)	11
Mathis v. United States, 376 F.2d 597 (5th Cir. 1967), rev'd., 391 U.S. 1 (1968)	8, 10.
Miranda v. Arizona, 384 U.S. 436 (1966)	7, 9, 10, 11, 18
Muse v. United States, 405 F.2d 40 (8th Cir. 1968)	18

North Texas Producers' Association v. Metzger Dairies, Inc., 348 F.2d 189 (5th Cir. 1965), cert. den., 382 U.S. 977 (1966) 22

Preferred Risk Mutual Insurance Company v. Thomas, 372 F.2d 227 (5th Cir. 1967) 22

Romanelli v. Commissioner, 54 T.C.—, No. 138, Docket No. 3504-67, filed July 2, 1970 10

Simmons v. Bomar, 349 F.2d 365 (6th Cir. 1965) 15

Schlinsky v. United States, 379 F.2d 735 (1st Cir. 1967), cert. den., 389 U.S. 920 (1967) 16

Spinney v. United States, 385 F.2d 908 (1st Cir. 1967), cert. den., 309 U.S. 921 (1968) 17

Teitelbaum v. C. I. R., 294 F.2d 541 (7th Cir. 1961), cert. den., 368 U.S. 987 (1962) 23

United States v. Carroll, 234 F.2d 679 (D.C.Cir. 1956) 24

United States v. Dickerson, 413 F.2d 1111 (7th Cir. 1969) 8, 9

United States v. Luna,—F.Supp.—(W.D.Tex. 1970) 11

United States v. Mackiewicz, 401 F.2d 219 (2nd Cir. 1968), cert. den., 393 U.S. 923 (1968) 17

United States v. Mansfield, 381 F.2d 961 (7th Cir. 1967), cert. den., 389 U.S. 1015 (1967) 17

United States v. Middleton,—F.Supp.— (D.C.Minn. 1970) 11

United States v. Page, 302 F.2d 81 (9th Cir. 1962) 14

United States v. Prudden, 424 F.2d 1021 (5th Cir. 1970), petition for certiorari filed 6, 7, 8, 21

United States v. Teller, 397 F.2d 194 (7th Cir. 1968), cert. den., 393 U.S. 937 (1968) 23

United States v. Tonahill, 308 F.Supp. 97 (E.D.Tex. 1970) 5

United States v. Ziemer, 291 F.2d 100 (7th Cir. 1961), cert. den., 368 U.S. 877 (1961) 23

Wren v. United States, 352 F.2d 617 (10th Cir. 1965), cert. den., 384 U.S. 944 (1966) 13

STATUTES:

18 U.S.C. §3731	2, 4, 24
26 U.S.C. §7201	4
28 U.S.C. §519	26
28 U.S.C. §541	26
28 U.S.C. §1254(1)	2

RULES:

28(a)(2), Federal Rules of Appellate Procedure	22

CONSTITUTION:

United States Constitution, Amendment IV	3
United States Constitution, Amendment V	3
United States Constitution, Amendment VI	3

IN THE

SUPREME COURT OF THE UNITED STATES

NO. _____

October Term, 1970

* * *

JOE H. TONAHILL,

Petitioner

v.

THE UNITED STATES OF AMERICA,

Respondent

* * *

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

Petitioner, Joe H. Tonahill, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit whereby that court overruled and set aside a district court order excluding from evidence certain information obtained by Treasury Agents in the course of an income tax investigation.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit has not yet been reported. It appears in the Appendix hereto (pp. A-9-14), as does the order overruling motion for rehearing (p. A-15). A prior order of that court denying Appellee's Motion to Dismiss for Want of Jurisdiction is also included in the Appendix hereto (p. A-8). The opinion of the District

Court for the Eastern District of Texas, Beaumont Division, reported, 308 F.Supp. 97 (E.D.Tex. 1970), similarly appears in the Appendix hereto (pp. A-1-7).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 13, 1970. A timely filed petition for rehearing was denied on August 13, 1970, and this petition for certiorari was filed within 30 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The questions presented by this case are as follows:

1. Are *Miranda*-type warnings required in criminal investigations for possible income tax fraud?

2. On the question of waiver of constitutional rights is the burden on the defendant to prove by clear and convincing evidence that evidence was obtained from him by fraud, trickery or deceit or is the burden on the government to prove that the evidence was voluntarily given by the defendant?

3. Does the refusal of Treasury Agents to answer direct inquiries as to the nature of their investigation coupled with evasive responses constitute fraud, trickery or deceit making evidence obtained thereby subject to motion to suppress in an income tax fraud case?

4. Does a court of appeals have the authority to reverse a district court's findings of fact and to render a contrary judgment when the appellant has not tried the facts in issue and has conceded that the facts as found by the trial court are true?

5. Is the specification in 18 U.S.C. §3731 that cer-

tification be made by "the United States attorney" essential to the exercise of jurisdiction by a court of appeals?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES, AMENDMENT IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing that place to be searched, and the person or things to be seized."

CONSTITUTION OF THE UNITED STATES, AMENDMENT V:

> "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . ."

CONSTITUTION OF THE UNITED STATES, AMENDMENT VI:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; . . . and to have the Assistance of Counsel for his defense."

18 U.S.C. §3731:

> "An appeal may be taken by or on behalf of the United States from the district courts to a court of appeals in all criminal cases in the following instances:
>
> ". . .
>
> "From an order granting . . . a motion to suppress evidence, . . . if the United States attorney certifies to the judge who granted such motion that the appeal is not taken for the purpose of delay

and that the evidence is a substantial proof of the charge pending against the defendant."

STATEMENT OF THE CASE

Petitioner is under indictment for violation of Internal Revenue Code, 26 U.S.C. §7201 (Cir.Ct.Appendix, pp. 8-10). In response to his motion grounded on the Fourth, Fifth, and Sixth Amendments to the Constitution of the United States (Cir.Ct.Appendix, pp. 11-17), the United States District Court entered an order suppressing evidence found to have been obtained by "affirmative fraud, trickery and deceit" on the part of the Revenue Agents. Because of the conclusion on that point, the district court found it unnecessary to "reach the question of whether *Miranda* applies to the instant case" (Appendix, pp. A-2-5).

In reliance upon 18 U.S.C. §3731, an Assistant Attorney General gave notice of appeal on behalf of the United States and signed a certificate relative to matters specified in the statute. The United States attorney for the district did not participate in the appeal in any way. As defendant-appellee, Petitioner filed a motion to dismiss for want of jurisdiction because of failure to comply with mandatory provisions of the statute. The motion was denied by the Court of Appeals for the Fifth Circuit (Appendix, p. A-8).

The government's appeal was based upon only two issues which were stated to be (Brief for Appellant, p. 1):

> "1. Whether Treasury agents have a duty to warn a taxpayer that their investigation into his civil tax liability has taken on criminal aspects.
>
> "2. Whether, under the facts as found by the District Court in this case, there was such deception

on the part of the Treasury agents that the evidence furnished by the defendant was properly suppressed."

The position of the government was that *Miranda*-type warnings are not required in criminal investigations for possible income tax evasion and that "admissions [made without any warning whatsoever] are not rendered inadmissible merely because they are procured by deceit, trickery or fraud" (Brief for Appellant, pp. 6-7). Both of the investigating agents had admitted that no warnings were given (Tr. B. 68, 87)[1] and their testimony was in substantial agreement with that of Petitioner and his accountant on all matters to which the order of the district court referred in its findings of affirmative fraud, trickery and deceit.

The case on appeal was based upon "the facts as found by the District Court." The government, therefore, accepted and in effect stipulated to the correctness of the trial court's findings that "neither Defendant nor his accountant had any conception of the significance of the term 'Special Agent.' . . . that the agents must have known that the Defendant and his accountant did not understand that the audit or investigation was criminal" (Appendix, p. A-3), that the defendant and his accountant asked "both Mr. Belschner and Special Agent Loventhal on several occasions when they met what they were doing, why the audit was taking so long, and whether fraud was involved" but that "not once did the Agents reply in the affirmative that 'fraud' or 'crime' was involved" (Appendix, p. A-3).

---

[1]Two hearings were held, one on September 9, 1968, and the other on July 25, 1969. The transcript of the testimony taken at the first is identified as "Tr. A.," that of the second, as "Tr. B."

The trial court also found and the government also necessarily conceded that any statements which the Agents might have made relative to an attempt to defeat or evade tax "were coupled with considerable conversation concerning legitimate deductions missed by the Defendant but picked up by them, and errors made by the Defendant in favor of the government [and that] such evasiveness by the Agents in the face of direct questions by the Defendant constitutes affirmative fraud, trickery and deceit" (Appendix pp. A-4-5).

Even though the government as appellant had not disputed but instead had predicated its appeal on "the facts as found by the District Court," the Court of Appeals for the Fifth Circuit reversed the judgment upon the basis of conclusions that the evidence did not support the findings of the trial court and that the defendant had failed to meet "his burden" of proving "*material* misrepresentation which *clearly* and *convincingly* shows fraud" (Appendix, p. A-13) (emphasis by the court).

The Court of Appeals for the Fifth Circuit held that the case at bar was controlled by its earlier decision in *United States v. Prudden*, 424 F.2d 1021 (5th Cir. 1970, *petition for certiorari filed*), a copy of which opinion is attached (Appendix, pp. A-16-44). The cases are alike in that both involve the applicability of *Miranda*-type warnings to income tax fraud investigations, and in neither was such a warning given, but there are marked differences in other respects both factually and procedurally. Of major significance is the fact that in *Prudden* the government placed in issue the sufficiency of the evidence to support the district court's findings of fact while in the case at bar the government accepted as true "the facts as

found by the trial court" and simply contended that evidence did not become inadmissible even though procured by fraud, trickery or deceit.

REASONS FOR GRANTING THE WRIT

The qualifications for review on certiorari, as specified in Rule 19 of this Court, are abundantly and compellingly fulfilled by the case at bar.

1. *The holding that* Miranda *is inapplicable to criminal investigations of income tax evasion is not only in conflict with decisions of another court of appeals, but is also, in effect, an invitation to this Court to decide an important question of federal law which has not been but should be decided by this Court.*

Petitioner has consistently maintained that when the nature of the investigation changed from civil to criminal he should have been given—but admittedly was not—the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966). The only reference to the point in the opinion of the Court of Appeals is the note reading (Appendix, p. A-12):

> "Because he found the agents had obtained the evidence from the defendant-taxpayer by fraud, trickery and deceit, the District Judge did not reach the question whether the agents were required to give *Miranda* warnings when the nature of the investigation changed from civil to criminal. If there was any doubt about this question before, it was resolved by *United States v. Prudden*, 5 Cir. 1970, —— F.2d —— [No. 28,140, April 10, 1970] which held that *Miranda* warnings are not required."

The court, thus, incorporated and made applicable here its previous rulings in *Prudden* where the con-

flict with other decisions was clearly recognized. Referring to *United States v. Dickerson*, 413 F.2d 1111 (7th Cir. 1969), the court wrote (424 F.2d 1028; Appendix, p. A-28):

> "*Dickerson* held that *Miranda* warnings must be given a taxpayer at the inception of first contact with him following the transfer of a tax case to the Intelligence Division. . . .
>
> ". . . Such a rule is over broad and we *expressly decline to follow it.*" (Emphasis added.)

When one court of appeals expressly declines to follow the holding of another equal court, the issue unquestionably is squarely presented to this Court for decision. The need for action by this Court is emphasized here because of the importance of the matter to all of the people of the nation. The particular circuit in which a taxpayer resides should not be determinative of his constitutional rights under the Fifth and Sixth Amendments to the Constitution of the United States.

As the intermediate court was forced to concede in *Prudden*, this Court's decision in *Mathis v. United States*, 391 U.S. 1 (1968), conclusively rejected the lower holding that tax investigations are totally immune from the *Miranda* requirements for warnings. The circuit court, however, assumed to read *Mathis* as turning entirely upon the fact of physical custody even though the taxpayer had been encarcerated for an entirely separate offense. In *Prudden*, therefore, the circuit court modified its previous conclusion—*Mathis v. United States*, 376 F.2d 597 (5th Cir. 1967, *rev'd.*) —only to the extent of recognizing that *Miranda*-type warnings are required whenever there is physical restraint.

The Court of Appeals for the Seventh Circuit has obviously differed in its construction both of *Miranda* and of *Mathis*. With regard to the earlier decision, that court in *Dickerson* wrote (413 F.2d 1114):

> "Intelligent exercise or waiver of the Fifth Amendment privilege is the heart of the Court's concern in *Miranda*. . . . We understand the teaching of *Miranda* to be that one confronted with governmental authority in an adversary situation should be accorded the opportunity to make an intelligent decision as to the assertion or relinquishment of those constitutional rights designed to protect him under precisely such circumstances. . . . But custodial interrogation is merely one variety of confrontation, albeit one requiring the most stringent of protections for the criminal suspect. The inquiry does not end with custody or its absence. See Hewitt, 'The Constitutional Rights of the Taxpayer in a Fraud Investigation,' 44 Taxes 660, 668, (1966)."

Only this Court can say whether *Miranda* (a) is applicable exclusively to persons physically restrained or (b) requires that one confronted with governmental authority in an adversary situation must be accorded the opportunity of making an intelligent choice. Clearly the Fifth and Seventh Circuit Courts have read *Miranda* differently. The same is true of *Mathis*, which the Court of Appeals for the Seventh Circuit did not construe as requiring physical restraint but rather as supporting its interpretation of *Miranda*.

The Court of Appeals for the Seventh Circuit rejected the government's contention that custodial detention was the determinative factor as to *Miranda* applicability (413 F.2d 1115-1116):

> "The Government argues that the absence of custodial detention and other indicia of criminal pros-

ecution in the tax fraud investigation negatives any possibility of coercion or overbearing of the taxpayer's will. But it is the very fact that the taxpayer is not informed of the pendency of a criminal investigation which aggravates the dilemma in which he finds himself. Unaware of the possible consequences of his cooperation with the agents, he may nevertheless believe that he is obligated to supply the necessary information in order to satisfy any possible tax deficiency which he may owe."

The Court of Appeals for the Fifth Circuit has clearly adopted the identical contentions which the Seventh Circuit rejected. The holdings of the two courts of appeals are in diametric conflict, both in their interpretation of *Miranda* and in their interpretation of *Mathis*.

The need for clarification by this Court is further emphasized by the recent civil case of *Romanelli v. Commissioner*, 54 T.C. ___, No. 138, Docket No. 3504-67, filed July 2, 1970. The majority of the Tax Court held that admissions obtained without *Miranda* warnings are admissible in a civil suit but specifically pointed out that:

"... petitioner's privilege against self-incrimination may be adequately safe-guarded by an appropriate exclusionary order in any criminal proceeding which may follow."

In a footnote there it was also explained that:

"The exclusionary rule with respect to compelled testimony encompasses the 'fruit' of the testimony as well as the compelled testimony itself. *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 (1964); *Arndstein v. McCarthy*, 254 U.S. 71 (1920). The Government bears the burden of proving in any subsequent criminal proceeding the absence of

'taint' respecting evidence it seeks to offer by establishing an independent source of such evidence. *Murphy v. Waterfront Comm'n, supra*, at 79 fn. 18."

The position taken in the dissenting opinion was that not only should *Miranda* warnings be requisite to admissibility of evidence in criminal prosecutions but that they should be required in civil proceedings as well. A concurring opinion agrees with the majority ruling in the specific case but expresses the view that it is not sufficient to confine the prohibition to the use of the fruits of custodial situations to instances where the interrogee's physical safety is threatened.

The fact that the Internal Revenue Service has adopted a policy in conformity with the Seventh Circuit decision and the holding of the Tax Court does not lessen the importance of the issue here. The rules of the Internal Revenue Service are subject to change, and failure to follow rules has been held to be insufficient to require exclusion of evidence. *United States v. Luna*, — F.Supp. — (W.D.Tex. 1970), and *United States v. Middleton*, — F.Supp. — (D.C.Minn. 1970). The issue here is basically judicial rather than administrative. Even before *Miranda*, this Court in *Mapp v. Ohio*, 376 U.S. 643 (1961), pointed out that judicial integrity is at stake when a determination must be made as to the use of evidence previously found to have been illegally obtained.

2. *In holding that the burden is on the defendant to prove that evidence was obtained from him by material misrepresentation which clearly and convincingly shows fraud, the decision below is in conflict with decisions of this Court and of other courts of appeals holding that the prosecution has the burden of proving that consent was voluntarily given.*

The documents and oral evidence which were the subject of Petitioner's motion to suppress were not taken pursuant to warrant. In reply to Petitioner's motion based on the Fourth, Fifth, and Sixth Amendments to the Constitution of the United States, the government took the position that the "admissions made in the case at bar were truly voluntary and hence not obtained in violation of . . . constitutional rights" (Brief for Appellant, p. 22). The district court granted the motion to suppress; the Court of Appeals for the Fifth Circuit reversed, holding (Appendix, p. A-13):

> "We cannot say on this record that there was a *material* misrepresentation which *clearly* and *convincingly* shows fraud and the defendant has therefore failed to meet his burden." (Italics by the Court.)

The court, thus, squarely placed the burden of proof on the defendant. Other courts in the same situation place the burden of proof on the government. In *Bumper v. State of North Carolina*, 391 U.S. 543 (1968), this Court ruled that (391 U.S. 548-550):

> "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority."

There is like conflict with *Arrington v. Maxwell*, 409 F.2d 849 (6th Cir. 1969), where the holding reads (409 F.2d 851):

> "The District Court was correct in ruling that the Common Pleas judge erred in placing the burden on Arrington to prove the involuntariness of his admissions. Such had been the law of Ohio, but it was in conflict with Jackson v. Denno, 378 U.S.

368, 84 S.Ct. 1774, 12 L.Ed.2d 908, 1 A.L.R.3d 1205 (1964), and Sims v. Georgia, 385 U.S. 538, 544, 87 S.Ct. 639, 17 L.Ed.2d 593 (1967), which held that before the issue of voluntariness of a confession can be submitted to a jury the trial judge must make his own independent determination that the confession was voluntary. We consider that under these decisions the burden of proving voluntariness of a confession is upon the prosecution."

Another decision in point is *Wren v. United States*, 352 F.2d 617 (10th Cir. 1965), *cert den.*, 384 U.S. 944 (1966), where the holding was (352 F.2d 618):

"It is fundamental in our judicial process, as guaranteed by the Fourth Amendment, that we are secure in our persons, houses, papers and effects against unreasonable searches and seizures. This constitutional right, like all others, may be waived by voluntary consent. In order to constitute a voluntary consent it must clearly appear that the search was voluntarily permitted or expressly invited and agreed to by the person whose right is involved. In addition, such person must be cognizant of his rights in the premises, the consent must not be contaminated by any duress or coercion and the government has the burden of proof."

In *Judd v. United States*, 190 F.2d 649 (D.C.Cir. 1951), the court summarized (190 F.2d 650-651):

"Searches and seizures made without a proper warrant are generally to be regarded as unreasonable and violative of the Fourth Amendment. True, the obtaining of the warrant may on occasion be waived by the individual; he may give his consent to the search and seizure. But such a waiver or consent must be proved by clear and positive testimony, and it must be established that there was no duress or coercion, actual or implied. Amos v. United States, 255 U.S. 313, 41 S.Ct. 266, 65 L.Ed.

654; United States v. Kelih, D.C.S.D. Ill. 1921, 272 F. 484. The Government must show a consent that is 'unequivocal and specific' (Karwicki v. United States, 4 Cir., 55 F.2d 225, 226); 'freely and intelligently given.' Kovach v. United States, 6 Cir., 53 F.2d 639."

Particularly applicable to the record here is the final holding in the above case where the court explained that, (190 F.2d 652):

> "Before a court holds that a defendant has waived his protection under the Fourth Amendment, 'there must be convincing evidence to that effect.' Nueslein v. District of Columbia, 73 App.D.C. 85, 89, 115 F.2d 690, 694. Here, the officers themselves do not appear completely convinced.
>
> ". . . The real issue is whether the evidence offered by the Government, taken at full value, meets the required standard. We hold that it does not: that there has not been a sufficient showing of true consent, free of duress and coercion. Standards of this sort must be maintained and enforced by the trial and appellate courts. If they are not, the guarantees of the Bill of Rights can quickly disappear through tacit nullification. We must hold that there was no consent and that the search and seizure were not permissible. Accordingly, the evidence was inadmissible and the motion to suppress should have been granted."

Similarly, in *United States v. Page*, 302 F.2d 81 (9th Cir. 1962), it was pointed out that (302 F.2d 83-84):

> "Because of the importance of preserving constitutional rights, various rules have been stated for the guidance of the trial judge in determining whether consent to the search was in fact given. The government must prove that consent was given. It must show that there was no duress or coercion, express or implied. The consent must be 'un-

equivocal and specific and 'freely and intelligently given.' There must be convincing evidence that defendant has waived his rights. There must be 'clear and positive testimony.' 'Courts indulge every reasonable presumption against waiver' of fundamental constitutional rights.' Coercion is implicit in situations where consent is obtained under color of the badge, and the government must 'show that there was no coercion in fact.'"

Still another court of appeals in *Simmons v. Bomar*, 349 F.2d 365 (6th Cir. 1965), wrote (349 F.2d 366):

> "Consent to a search, in order to be voluntary, must be unequivocal, specific and intelligently given, uncontaminated by any duress or coercion, and is not lightly to be inferred. United States v. Como, 340 F.2d 891 (C.A.2). The government has the burden of proving that such consent has been given."

The decision here subject to review is apparently unique both in assuming a waiver of constitutional rights without a shred of evidence to support such an assumption and in placing upon a defendant charged with crime the burden of negating consent to violation of constitutional rights.

3. The decision below calls for an exercise of this Court's power of supervision because it constitutes a complete departure from the accepted and usual course of judicial proceeding in holding that even though no warning whatsoever was given to Petitioner, the evidence was not illegally obtained but was instead voluntarily given.

Although the decision below utilizes none of the language normally found in search and seizure cases, Petitioner was apparently charged with the responsibility of assuming that the investigation was crimi-

nal merely because he was not specifically and categorically informed otherwise. The only portion of the opinion touching upon that matter even by implication is that which reads (Appendix, p. A-13):

> "The agents did not say or indicate in any way that their investigation was not criminal or that there was no possibility of a criminal prosecution. They said their function was to reconcile large discrepancies to see if they were the result of innocent errors. If anything, such a statement to an attorney and his accountant, especially when accompanied by prolonged investigation, should have put the taxpayer on guard that if the agents determined that the large discrepancies were not the result of innocent errors he would be subject to criminal prosecution."

The complete absence of any warning to Petitioner in the case at bar distinguishes it from the decisions of other circuits holding that evidence had been voluntarily given rather than illegally obtained. In *Schlinsky v. United States*, 379 F.2d 735 (1st Cir. 1967), *cert. den.*, 389 U.S. 929 (1967), the court held that a motion to suppress had been properly denied on the ground that the defendant's actions were voluntary because when (379 F.2d 738):

> ". . . the possibility of criminal liability appeared, the case was turned over to a Special Agent who, at his first meeting with the defendant, advised him that he need not answer any questions, that he need not produce any records that might incriminate him, and that he could terminate the interview at any time."

In *Frohmann v. United States*, 380 F.2d 832 (8th Cir. 1967), the evidence in question was found to be admissible because the Special Agent had "advised the defendant that he had a right not to answer any

questions" and the defendant had "replied that he 'did not intend to use that privilege' " (380 F.2d 835).

In *United States v. Mansfield*, 381 F.2d 961 (7th Cir. 1967), *cert. den.*, 389 U.S. 1015 (1967), the evidence in question was held to have been voluntarily given because the defendant had been told by the agent that "there was a possibility of criminal prosecution and that Dr. Mansfield did not have to talk to the agents or show them any records" (381 F.2d 963). In *Spinney v. United States*, 385 F.2d 908 (1st Cir. 1967), *cert. den.*, 390 U.S. 921 (1968), the court quoted a transcript of the interview with the defendant wherein he was specifically told that "you should understand if you do make any statements, or submit any evidence, these statements must be made under oath, and you should be cognizant of your constitutional guarantee against self-incrimination" (385 F.2d 909).

In *United States v. Mackiewicz*, 401 F.2d 219 (2nd Cir. 1968), *cert. den.*, 393 U.S. 923 (1968), there was both a warning and a specific finding of waiver. In reciting the facts the court there pointed out that (401 F.2d 220-221):

> "Agent Harden displayed his badge and advised Mr. Mackiewicz that he was making an inquiry into certain tax deficiencies on his and Mrs. Mackiewicz's joint return. He further told Mr. Mackiewicz that he did not have to answer any questions or produce any documents which might incriminate him. The agent repeated this, and Mr. Mackiewicz indicated, by an affirmative nod, that he understood."

Upon the basis of that and other evidence before it, the court held (401 F.2d 223):

> "Finally, we conclude that Mr. Mackiewicz knowingly and intelligently waived whatever rights he

had. He indicated that he understood the warning the agents gave him. . . . Under these circumstances, we believe that he unequivocally and freely consented to the searches and seizures and he intelligently and knowingly agreed to answer the agents' questions."

In *Muse v. United States*, 405 F.2d 40 (8th Cir. 1968), *cert. den.*, 393 U.S. 1117 (1969), it was shown that the Special Agent, upon introducing himself, read a full constitutional warning. In *Cohen v. United States*, 405 F.2d 34 (8th Cir. 1968), *cert. den.*, 394 U.S. 943 (1969), the defendant was advised that he need not answer any questions which tended to incriminate him. He responded that he understood. The court, therefore, held that the evidence had been voluntarily given. The decision is particularly significant in that in footnote 7 (405 F.2d 37-38), a review of the decisions of the courts of appeals of the various circuits in income tax fraud cases shows that the courts of all circuits, other than the Fifth Circuit, have held evidence to have been voluntarily provided by the defendant only in instances where the defendant was warned of his right to remain silent. Although under the circumstance of a warning's having been given and the defendant's having indicated his understanding thereof, the court held that the full *Miranda* warnings were not essential, the court concluded its opinion with the statement that (405 F.2d 40):

"We also reemphasize the views that we expressed in *White* that disclosures to Internal Revenue Service Agents, Revenue or Special, must be entirely voluntary and must not be induced by coercion, fraud, or misrepresentation."

Where, as in the case here subject to review, not even a minimal warning was given and the government

even admitted to some deceit on the part of the agents, it appears that only the Court of Appeals for the Fifth Circuit would hold evidence obtained under such circumstances to be admissible. The situation calls for an exercise of this Court's power of supervision.

4. In condoning the conduct of the Revenue Agents in securing evidence from Petitioner, the decision below conflicts with applicable decisions of this Court and other courts of appeals.

The decision below recognizes as a general rule that "Revenue Agents cannot obtain information from taxpayers by fraud, trickery or deceit which misrepresents the nature of the search" (Appendix, p. A-13), but the record conclusively establishes that in the same decision judicial sanction was given to conduct which the government itself conceded to constitute "affirmative fraud, trickery and deceit."

Throughout the case, the government assumed and contended that it is perfectly all right for Treasury Agents to deceive the taxpayer, that they have no obligation to respond to direct questions, that they may make misleading replies, and that they may deliberately encourage the taxpayer to misunderstand the real nature of their investigation. The government's position is made abundantly clear by the statement that (Brief of Appellant, p. 7) "deceit practiced by law enforcement officials, in and of itself, is not enough to warrant suppression of confessions or admissions."

The government did not attempt to question the facts; they were clearly and undisputedly shown by the record. Instead, the government's position was that "deceit" of Internal Revenue Service representatives did not warrant suppression of evidence unless it was so extensive as "to overbear defendant's will" (Brief

of Appellant, p. 8). The court below obviously, if not specifically, adopted that contention in holding that the record here failed to establish "a *material* misrepresentation which *clearly* and *convincingly* shows fraud" (Appendix, p. A-13).

This Court has refused so to limit the requirement of the Fourth Amendment. In *Gouled v. United States*, 255 U.S. 298 (1921), it was explained that (255 U.S. 305-306):

> "The prohibition of the Fourth Amendment is against all unreasonable searches and seizures and if for a government officer to obtain entrance to a man's house or office by force or by an illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers would be an unreasonable and therefore a prohibited search and seizure, as it certainly would be, it is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force or coercion. The security and privacy of the home or office and of the papers of the owner would be as much invaded and the search and seizure would be as much against his will in the one case as in the other, and it must therefore be regarded as equally in violation of his constitutional rights.
>
> "Without discussing them, we cannot doubt that such decisions as there are in conflict with this conclusion are unsound, and that, whether entrance to the home or office of a person suspected of crime be obtained by a representative of any branch or subdivision of the government of the United States by stealth, or through social acquaintance, or in the guise of a business call, and whether the owner be present or not when he enters, any search and seizure subsequently and secretly made in his ab-

sence, falls within the scope of the prohibition of the Fourth Amendment, ..."

In *Hoffa v. United States*, 385 U.S. 293 (1966), this Court repeated the rule that (385 U.S. 301):

> "The Fourth Amendment can certainly be violated by guileful as well as by forcible intrusions into a constitutionally protected area. Gouled v. United States, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647. And the protections of the Fourth Amendment are surely not limited to tangibles, but can extend as well to oral statements. Silverman v. United States, 265 U.S. 505, 81 S.Ct. 679, 5 L.Ed.2d 734."

The agents here were repeatedly asked whether their investigation was criminal in nature. They admitted that they never replied in the affirmative but instead evaded making a direct answer. With those undisputed facts before it, the court below held that the record did not establish the existence of fraud. Another court of appeals, however, has held in *Charles Hughes & Co., Inc., v. Securities & Exchange Commission*, 139 F.2d 434 (2nd Cir. 1943), *cert. den.*, 321 U.S. 786 (1944), that (139 F.2d 437):

> "The law of fraud knows no difference between express representation on the one hand and implied misrepresentations or concealment on the other. Strong v. Repide, 213 U.S. 419, 430, 29 S.Ct. 521, 53 L.Ed. 853; United States v. Brown, 2 Cir., 79 F.2d 321, certiorari denied 296 U.S. 650, 56 S.Ct. 309, 80 L.Ed. 462."

The decision below would give to Internal Revenue Agents a degree of latitude in securing evidence for criminal prosecutions which has never before been approved, not even in *Prudden* and clearly not by any of the other courts of appeals as is shown in the previous discussions of conflict in holdings on other aspects of the case.

5. *The decision below departs from the accepted and usual course of judicial proceedings in that (a) the holding was based on a point not placed in issue by the government as appellant and (b) the factual determination of the district court was reversed without regard to the "clearly erroneous test."*

The decision below rests entirely upon the court's determination that Petitioner "failed to meet his burden" of proving a "*material* misrepresentation which *clearly* and *convincingly* shows fraud" (Appendix, p. A-13; italics by the court). The government, as appellant had not contended that Petitioner had any such burden; it had not sought appellate review of any fact finding of the District Court.

It is, therefore, abundantly clear that the decision below rested upon issues which were neither raised nor briefed by the government. Rule 28(a)(2), Federal Rules of Appellate Procedure, specifies that the appellant's brief should include "a statement of the issues to be reviewed." The government's brief submitted to the court below contains a statement of two issues (quoted hereinabove, p. 4), but neither in any way purports to seek review either of "burden of proof" or of the district court's fact findings of "affirmative fraud, trickery and deceit." Thus, from the procedural standpoint, the decision below is contrary to rule authority and in conflict with *Preferred Risk Mutual Insurance Company v. Thomas*, 372 F.2d 227 (4th Cir. 1967), and *North Texas Producers' Association v. Metzger Dairies, Inc.*, 348 F.2d 189 (5th Cir. 1965), *cert. den.*, 382 U.S. 977 (1966).

Even in cases where fact findings of a district court are placed in issue by an appellant, it is contrary to

the accepted and usual course of judicial proceedings for a court of appeals to reverse the trial court, as was done in the decision below, merely because the appellate court reached a different conclusion on the evidence. The district court here found "affirmative fraud." Fraud is a question of fact. *Brooks v. American Brass Company*, 263 F.2d 166 (6th Cir. 1959); *Teitelbaum v. C. I. R.*, 294 F.2d 541 (7th Cir. 1961), *cert. den.*, 368 U.S. 987 (1962). The accepted and usual course of judicial proceedings for review in such instances is typified by *United States v. Ziemer*, 291 F.2d 100 (7th Cir. 1961); *cert. den.*, 368 U.S. 877 (1961), where the court explained that (291 F.2d 102):

> "As a reviewing court we have no right to weigh the evidence and determine which witnesses told the truth. The trial judge's decision on the matter of fact, which was supported by evidence which he deemed credible, should not be set aside by this court even though from a reading of the entire record we might, (although we do not) come to an opposite conclusion."

In conformity with the above practice, *see also United States v. Tyller*, 397 F.2d 494 (7th Cir. 1968), *cert. den.*, 393 U.S. 937 (1968); *Byrd v. Lane*, 398 F.2d 750 (7th Cir. 1968), *cert. den.*, 393 U.S. 1020 (1968); and *Howard v. Swenson*, 404 F.2d 469 (8th Cir. 1968).

The decision below does not even purport to have rested upon the "clearly erroneous" test. The record here could not be said to meet the requirements of that test as set out in *Jackson v. United States*, 353 F.2d 862 (D.C.Cir. 1965). It is respectfully submitted that such a departure by a court of appeals calls for the exercise of this Court's power of supervision.

6. *The decision below represents an assumption of jurisdiction exercised without compliance with*

requirements of the statute asserted as authorizing appeal and, therefore, calls for an exercise of this Court's power of supervision.

The paragraph of 18 U.S.C. §3731 under which the government took its appeal from the district court order makes requisite to appeal from an order suppressing evidence the certification of the United States attorney that the appeal is not taken for the purpose of delay and that the evidence is a substantial proof of the charge pending against the defendant. The notice of appeal herein filed contains a certificate but it is signed by a person who indentified himself as Assistant Attorney General and whose address is shown in all instruments filed in this cause to be Justice Department, Washington, D. C., not by the United States attorney for the United States District Court for the Eastern District of Texas. Petitioner's motion to dismiss grounded upon the absence of the authorized signature on the notice of appeal was denied by the Court of Appeals for the Fifth Circuit (Appendix, p. A-8).

The particular provision here involved was added to 18 U.S.C. §3731 in 1968 (Pub.L. 90-351, Title VIII, §301, 82 Stat. 237). Prior to that enactment a district court order dismissing an indictment was appealable by the government but the granting of a motion to suppress evidence was not. The government, however, appealed from a suspension order where the indictment had not been dismissed, contending that under the circumstances of the case the suspension order was tantamount to requiring a dismissal and in *United States v. Carroll*, 234 F.2d 679 (D.C. Cir. 1956), secured a reversal of the district court order.

Just as the Court of Appeals for the District of

Columbia in *Carroll* assumed that a motion to suppress evidence was appealable if the suppression order would ultimately require dismissal of the indictment, the Fifth Circuit in the case at bar must have assumed that certification of notice of appeal by an Assistant Attorney General was substantially the same as certification by "the United States attorney" for the district court.

In *Carroll*, however, this Court granted certiorari and reversed the court of appeals. The entire thrust of the opinion is that on government appeals in criminal cases exact compliance with statutory requirements is mandatory. *Carroll v. United States*, 354 U.S. 394 (1957). The basic rule there stated by this Court is that (354 U.S. 399-400):

> "It is axiomatic, as a matter of history as well as doctrine, that the existence of appellate jurisdiction in a specific federal court over a given type of case is dependent upon authority expressly conferred by statute. . . .
>
> ". . . in the federal jurisprudence, at least, appeals by the Government in criminal cases are something unusual, exceptional, not favored. The history shows resistance of the Court to the opening of an appellate route for the Government until it was plainly provided by the Congress, and after that a close restriction of its uses to those authorized by the statute."

In response to the government's contention there that form should not be exalted over substance, this Court pointed out that (354 U.S. 406):

> ". . . in a limited sense, form *is* substance with respect to ascertaining the existence of appellate jurisdiction. While it is always necessary to categorize a situation realistically, to place a given order according to its real effect, it remains true

that the categories themselves were defined by the Congress in terms of form. Many interlocutory decisions of a trial court may be of grave importance to a litigant, yet are not amenable to appeal at the time entered, and some are never satisfactorily reviewable. In particular is this true of the Government in a criminal case, for there is no authority today for interlocutory appeals. . . ." (Italics by the Court.)

When the provision under which this appeal was taken was ultimately enacted in 1968, Congress required that the notice of appeal be certified by "the United States attorney." It cannot be assumed that the term was lightly or loosely used. Under such circumstances, there would appear to be no more justification for equating an "Assistant Attorney General" to "the United States attorney" than for equating an order granting a motion to suppress asserted to require dismissal to a dismissal in fact. Congress must be presumed to have chosen language carefully and to have meant what it said.

The representative of the federal government at the local level is the United States attorney. His office is separate and apart from that of the Attorney General. He is appointed directly by the President and may be removed only by the President. 28 U.S.C. §541. The direction he exercises in the conduct of his office is independent.

The power and authority of the Attorney General to supervise litigation to which the United States, an agency or an officer thereof, is a party, is limited by the opening phrase of 28 U.S.C. §519—"except as otherwise authorized by law." Since proposals to permit government appeal from orders granting motions to suppress were repeatedly urged unsuccessfully before

the measure was ultimately enacted in 1968. Congress' final specification of "the United States attorney" as the person to make certification for notice of appeal appears most logically to be a requirement that in this unusual extension of criminal appellate jurisdiction the participation and agreement of the local officer would be required.

CONCLUSION

The decision below departs radically from both substantive and procedural judicial precedent. The matters involved are of extreme general and national significance. Questions are presented which have not been, but should properly be, conclusively determined by this Court. The holdings below cannot be reconciled with those of other courts of appeals.

The admissibility of evidence in a criminal trial in a federal district court should not be determined by the area or district in which the defendant resides. The conduct of revenue agents in obtaining records and evidence from taxpayers should not be controlled by the circuit in which cases are to be tried. The authority of a federal district court to pass upon the evidence should not be different in the courts of one circuit from that in the courts of other circuits.

The maintenance of uniformity in the administration of criminal justice in the federal courts is jeopardized by the decision below. All of the reasons listed above are, therefore, most strenuously urged as basis for this Court's exercise of discretion in granting of the writ.

Respectfully submitted,

SANDER W. SHAPIRO
P. O. Box 1148
Austin, Texas 78767
A/C 512 472-8442
Counsel of Record

CLARK, THOMAS, HARRIS, DENIUS
& WINTERS

MARY JOE CARROLL
P. O. Box 1148
Austin, Texas 78767
A/C 512 472-8442
of Counsel

UNITED STATES of America

v.

Joe H. TONAHILL.

Crim. No. 5737.

United States District Court
E. D. Texas,
Beaumont Division.

Jan. 14, 1970.

MEMORANDUM OPINION AND ORDER

ROBERTS, District Judge.*

Defendant is a lawyer of wide experience and reputation, who has resided and conducted his legal practice from offices in Jasper, Texas, within the Eastern District of Texas, for more than sixteen (16) years. His practice has been primarily before State and Federal Courts in Beaumont, Texas, within the Eastern District; and he has on occasion practiced before courts in Austin, Texas. He was indicted in San Antonio, Texas, on April 14, 1967, within the Western District of Texas, for three (3) counts of tax evasion in violation of Section 7201, Internal Revenue Code, 26 U.S.C.A. § 7201, alleged to have occurred within the Austin Division of the Western District of Texas, and covering the years 1960, 1961 and 1962. This was late on the last day before the count for 1960 would be barred by limitation. The case was removed by appropriate motion to the Beaumont Division of the Eastern Division of Texas, the Division and District in which the defendant resides.

*Sitting by special designation of Chief Judge, CCA. 5th Cir.; John R. Brown.

Among the various motions filed by or on behalf of the Defendant, is a motion to suppress certain evidence obtained by the Government on the grounds that such evidence was obtained through fraud, trickery and deceit, and on the further grounds that such evidence was obtained without first having given Defendant the so-called *Miranda* warnings. Hearings on the motion were held on December 8, 1968, and July 25, 1969. Conflicting testimony was heard from the witnesses as to what transpired at the meetings between Defendant and his accountant and representatives of the Internal Revenue Service. I have examined the record and resolved the conflicts; because of the conclusion I reach on the issue of fraud, trickery and deceit, I do not reach the question of whether *Miranda* applies to the instant case.

As is usual in cases of this kind, the investigation began as a civil audit of Defendant's business by Revenue Agent Belschner. Belschner examined Defendant's books and records from October of 1962, until March of 1964. His procedure was to examine what was submitted and return the records to Defendant or his accountant on a daily basis. The actual examination of the records for each year in this fashion took approximately five (5) days, although the Agent lingered on the case for over a year. By December 3, 1963, he no longer had any of Defendant's records. Sometime prior to March 10, 1964, he formed a suspicion that Defendant had violated Section 7201. On that date, he referred the case to the Intelligence Division of Internal Revenue, which assigned it to Special Agent Hugh Loventhal of the Division's Beaumont office.

No contact was made between the Revenue Service and Defendant from January of 1964, until September of 1964. On September 1, 1964, Belschner and Loven-

that met with Defendant and his accountant. Defendant arrived at the meeting early, was introduced to Loventhal, outside the presence of his accountant, as a special agent, and Loventhal stated that he was "assigned to conduct a detailed investigation into the years 1960, 1961 and 1962;" that "Mr. Belschner had discovered what had appeared to be large discrepancies. That was the reason for my participation in the case." If such statements were made, and there is testimony in the record to refute even them, they were made in a manner to minimize the importance of what was being said.

[1] It is obvious from the testimony that neither Defendant nor his accountant had any conception of the significance of the term "Special Agent." The accountant practiced locally in Jasper, had had in his practice only one matter go beyond the Revenue Agent level, and had experience with Revenue personnel from Beaumont only when they came to Jasper to help a local agent on civil matters. Defendant had no experience in tax matters whatsoever.

What is more important, in my opinion, is that the Agents must have known that the Defendant and his accountant did not understand that the audit or investigation was criminal. Defendant and his accountant were apprehensive enough—because of the length of time involved in the investigation—to ask both Mr. Belschner and Special Agent Loventhal on the several occasions when they met, what they were doing, why the audit was taking so long, and whether fraud was involved. Not once did the Agents reply in the affirmative that "fraud" or a "crime" was involved. Instead, they stated their function was to reconcile the large discrepancies, to see if they were the result of innocent errors. The Agents testified that they also told De-

fendant that they were trying to determine if he had attempted to "defeat" the tax, or "evade" the tax. Defendant and his accountant both deny that such statements were made. Assuming, however, that they were, they were coupled with considerable conversation concerning legitimate deductions missed by the Defendant but picked up by them, and errors made by the Defendant in favor of the Government. Such evasiveness by the Agents in the face of direct questions from the Defendant, constitute affirmative fraud, trickery and deceit. Especially is this so when the Agents knew, or should have known, by the actions and repeated questions of Defendant and his accountant, that they did not understand the nature of the investigation.

There was reason, also, for the Revenue Agents to keep the criminal investigation a secret from Defendant. They knew Defendant's reputation as a lawyer; they knew he had expertise in the criminal field; and they knew, as Defendant testified, that any description of the investigation as being criminal in nature would cut off their supply of information—which was given with the full and complete cooperation of the Defendant and his accountant. And even within forty-five (45) days of the receipt of these records, and before any further contact was made with Defendant, the Special Agent had submitted documents to the Office of the Examiner of Questioned Documents for analysis. The documents submitted concerned the same matter which had first aroused Belschner's suspicions.

Nor can there be any argument that the investigation was not a criminal investigation. While Loventhal's credentials as a "Special Agent" do not so state, he testified that he was a member of the Intelligence Division, and that a correct description of his functions would be to "enforce the criminal statutes" ap-

plicable to income tax laws. He further testified that he was instructed in 1967, to thereafter warn taxpayers of the criminal nature of the investigations and the taxpayer's rights under the fifth and sixth amendments, even though his duties do not appear to have changed after 1967. Without quoting from the record in detail, it is clear, and I so find, that Defendant and his accountant did not realize at least until Defendant employed a lawyer in the summer of 1965, that a criminal investigation was being conducted, that the Agents knew that Defendant and his accountant did not know the nature of the Investigation, and that they deliberately hid the fact that the investigation was criminal. Even the Government's counsel admits that such behavior constitutes, fraud, trickery and deceit.

[2, 3] There have been no Fifth Circuit cases that have dealt with the precise issue in question—namely, that fraud, trickery and deceit will be grounds for a motion to suppress in an income tax fraud case. Two case in point, however, are United States v. Prudden, 305 F.Supp. 110 (M.D. Fla. 1969) and Goodman v. United States, 285 F.Supp. 245 (C.D. Cal. 1968). While the evidence of affirmative deceit is different in each of the cases, in each as in this case, there was a failure to explain that a criminal investigation was in progress (or a failure to explain the distinction between "special" and "revenue" agents), coupled with affirmative action by the Agents resulting in incriminating actions being taken by the taxpayer. In this case, the affirmative action was the concealment of the nature of the investigation, the refusal of the Agents to tell Defendant and his accountant that a criminal investigation was underway when specifically asked, and the deliberate attempt to lull Defendant and his accountant into cooperating with the Agents. See Stuart v. United

States, 416 F.2d 459 (5th Cir. 1969). In this connection, I point out that a lawyer-defendent in a tax fraud case is held to no higher duty of knowledge of the tax laws and procedure than any other defendant, Bursten v. United States, 395 F.2d 976 (5th Cir. 1968), and cannot be expected to know the difference between a "revenue" and "special" agent. If he is a criminal lawyer, however, he knows enough not to waive his constitutional rights in the course of a criminal investigation. Until he knows the investigation is criminal in nature, however, he has no opportunity to utilize his knowledge. The agents were fully aware of Defendant's background, and deliberately hid the nature of the investigation.

Accordingly, I GRANT the motion to suppress all evidence received by the Special Agent from the Defendant or his accountant, and all evidence obtained through leads from evidence so obtained, or as a result of information given by Defendant or his accountant to the Special Agent, including within my order all evidence re-submitted to the Special Agent even though originally obtained prior thereto. I realize that some of the evidence was examined by Belschner prior to the entry of the Special Agent. It is obvious from the record, however—the time lapse between the date of last contact by Belschner alone and first contact by Special Agent Loventhal, the method of audit used by Belschner, and the lengthy investigation of more than two and one-half (2½) years made by the Special Agent after the matter was referred to him—that the Special Agent made his own investigation from the material submitted to him, and that the information obtained in the course of the civil audit was not used in the criminal investigation. Furthermore, if suppression of evidence obtained through the behavior of the Agents

in this case is to have any meaning, the evidence referred to above must be suppressed. The record shows what evidence was submitted to the Special Agent, which includes all material for which receipts were obtained, as well as material received by the Agents even though they neglected to receipt therefor.

In accordance with the foregoing factual findings and legal conclusions, the motion to suppress should be granted and it is so ordered.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29426

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

JOE H. TONAHILL,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Texas

---

Before GODBOLD, MORGAN and INGRAHAM, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellee's motion to dismiss appeal for want of jurisdiction, filed in the above styled and numbered cause, is hereby denied.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1969

No. 29426
Summary Calendar

D. C. Docket No. CR 5737

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

JOE H. TONAHILL,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Texas.

Before GOLDBERG, DYER and SIMPSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

Issued as Mandate: July 13, 1970

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 29426

Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

JOE H. TONAHILL,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Texas

---

(July 13, 1970)

Before GOLDBERG, DYER and SIMPSON, Circuit Judges.

DYER, Circuit Judge: The defendant was charged with three counts of willfully attempting to evade and defeat his individual income tax for the years 1960 through 1962 in violation of Section 7201 of the Internal Revenue Code of 1954. He moved to suppress from evidence oral statements he had made to treasury agents and documentary evidence seized by them, claiming that the evidence was illegally obtained because *Miranda* warnings were never given to him and because the agents induced him to furnish the evidence by fraud

and deceit by misleading him into thinking that there would be no criminal charges against him. The District Court granted this motion and the Government has appealed. Finding this case controlled by our recent decision in *United States v. Prudden*, 5 Cir. 1970, —— F.2d —— [No. 28,140. April 10, 1970] we reverse and remand.[1]

The defendant is a criminal attorney in Texas of wide experience and reputation. The investigation began as a civil audit of defendant's business in October, 1962. The Revenue Agent lingered on the case for over a year and during that period formed a suspicion that defendant had violated Section 7201. In March, 1964, he referred the case to the Intelligence Division of Internal Revenue, and the case was assigned to a Special Agent. There was no contact between the Revenue Service and defendant from January, 1964, until September, 1964, when the original investigating Revenue Agent and the Special Agent met with the defendant and his accountant.

The District Judge found that neither defendant nor his accountant knew the significance of the term "Special Agent." However, defendant and his accountant were apprehensive enough (because of the length of time involved in the investigation) to ask the agents on the several occasions when they met, what they were doing, why the audit was taking so long, and whether fraud was involved. The District Judge found that the Agents must have known that the defendant and his accountant did not understand that the audit or investigation was criminal and that, "Not once did the Agents reply in the affirmative [to the questions of defendant and his accountant] that 'fraud' or a

[1] Pursuant to our Rule 18 this case is decided without oral argument.

'crime' was involved. Instead, they stated their function was to reconcile the large discrepancies, to see if they were the result of innocent errors." Relying on *United States v. Prudden*, M.D. Fla. 1969, 305 F. Supp. 110, and *Goodman v. United States*, C.D. Cal. 1968, 285 F. Supp. 245, the District Judge found that the Revenue Agents had concealed the nature of the investigation from taxpayer and his accountant and that this amounted to fraud, trickery and deceit on their part. Accordingly, he granted the motion to suppress.[2]

Prudden was subsequently reversed by this Court and *Goodman* was distinguished in that opinion on the ground that the taxpayer there, "had only a grammar school education and was affirmatively led to believe that the information which he was giving the revenue agents was part of the investigation of another taxpayer," elements not present either in *Prudden* or in the instant case. Slip opinion at p. 33.

With the legal underpinnings swept away from the District Court's order granting his motion to suppress, the defendant attempts to turn the Fifth Circuit decision in *Prudden* to his advantage by arguing that, although *Prudden* approved silence on the part of investigating Revenue Agents, it expressly disapproved affirmative misrepresentations and said there was a duty not to leave unanswered an inquiry where doing so would be intentionally misleading. He argues that

[2]Because he found the agents had obtained the evidence from the defendant-taxpayer by fraud, trickery and deceit, the District Judge did not reach the question whether the agents were required to give *Miranda* warnings when the nature of the investigation changed from civil to criminal. If there was any doubt about this question before, it was resolved by *United States v. Prudden*, 5 Cir. 1970, —— F.2d —— [No. 28,140, April 10, 1970] which held that *Miranda* warning are not required.

the inquiries of himself and his accountant to the Revenue Agents imposed a duty on them to inform him that a criminal investigation was under way and that their answer affirmatively misled them.

We find no distinction between the instant case and *Prudden* which justifies different results in the two cases. Of course, there is no question, as *Prudden* pointed out, that Revenue Agents cannot obtain information from taxpayers by fraud, trickery or deceit which misrepresents the nature of the seach. But there must be "acts by the agent[s] which *materially* misrepresent the nature of the inquiry" before there is fraud, trickery or deceit and "the record . . . must disclose some affirmative misrepresentation to establish the existence of fraud, and this *showing must be clear and convincing.*" *Prudden* slip opin. at p. 28-30 (emphasis added).

We cannot say on this record that there was a *material* misrepresentation which *clearly and convincingly* shows fraud and the defendant has therefore failed to meet his burden.* The agents did not say or indicate in any way that their investigation was not criminal or that there was no possibility of a criminal prosecution. They said their function was to reconcile large discrepancies to see if they were the result of innocent errors. If anything, such a statement to an attorney and his accountant, especially when accompanied by prolonged investigation, should have put the taxpayer on guard that if the agents determined that the large discrepancies were not the result of innocent errors he would be subject to criminal prosecution.

---

*The emphasis of the District Court's order granting the motion to suppress was on the taxpayer's ignorance of the nature of the investigation and not, as required by *Prudden*, on what the agents said and did.

The order granting defendant's motion to suppress is reversed and the case is remanded to the District Court for further proceedings not inconsistent with this opinion.

REVERSED and REMANDED.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 29426

Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellant;

versus

JOE H. TONAHILL,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Texas

---

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(August 13, 1970)

Before GOLDBERG, DYER and SIMPSON, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

UNITED STATES of America,
Plaintiff-Appellant,

v.

Horton R. PRUDDEN, Defendant-Appellee.

No. 28140.

United States Court of Appeals,
Fifth Circuit.

April 10, 1970.

Before JOHN R. BROWN, Chief Judge, and COLEMAN and CLARK, Circuit Judges.

CLARK, Circuit Judge:

Horton R. Prudden was indicted on seventeen counts of evading taxes due the United States. On taxpayer's motion made prior to trial, the court below in a blanket order suppressed all statements made and all corporate and personal documents furnished by Prudden to a special agent of the Internal Revenue Service, together with all evidence obtained through or as a result of such statements or documentary evidence. Suppression was based on a finding that the Internal Revenue Service had obtained such statements and documents by engaging in a deliberate scheme to deceive Prudden in order to prevent his understanding that an investigation originally commenced by a revenue agent had materially altered at the time the special agent entered the case.[1] The United States chose to appeal the suppression order rather than to proceed to trial without the evidence thus suppressed. Since the record does

[1] 305 F.Supp. 110 (M.D.Fla.1969).

not clearly and convincingly demonstrate a deliberate scheme to deceive and we reject the taxpayer's contention that he was entitled to *Miranda* warnings, we reverse.

The following facts are either undisputed or are stated most favorably to the taxpayer. On May 10, 1963, certain returns of The Florida Corporation of America (FCA) and its subsidiaries were assigned to Revenue Agent Lexow for the purpose of determining the correctness of the tax reported. At this time Lexow had been with the Internal Revenue Service about one year—he was still in training and was not a full-grade agent. Prudden was 50 years of age, a law school graduate and then employed as a security analyst for a member firm of the New York Stock Exchange. After learning that FCA was to be examined, Prudden telephoned Lexow at the Palm Beach office of the Internal Revenue Service from his home in Connecticut, stating that he was a director of FCA. He inquired if Lexow's examination was to cover FCA alone or its subsidiaries also and further asked if the examination was routine. Lexow replied that the examination would cover both FCA and its subsidiaries and that it was not routine; that the returns had been selected in Jacksonville to be examined and had been assigned to Lexow from there.

The examination actually commenced on May 31 when Lexow contacted Mrs. Anne G. Smith, who was indicated on the returns to be the president of these corporations.[1] All of Lexow's subsequent examinations

[1] Prudden testified that Mrs. Smith had merely been a statistician and at the time of these examinations she was not a corporate officer but was acting as an independent agent on an hourly pay basis. The ownership of substantially all the FCA stock was held in trusts, of which Prudden was co-trustee for his sons.

were made under the supervision of Mrs. Smith either with or without Prudden present. Prudden and Mrs. Smith were cooperative with Agent Lexow, furnishing him most of the documents he wished to examine and making copies for him at his request. By June 17 Lexow's examinations had disclosed what he considered to be possible indications of fraud. It appeared to Lexow that a Nassau based corporation, Research and Development, Ltd., might be skimming profits off one of FCA's subsidiaries. He further noted there was no indication as required on the return, that the Bahamian and American corporations were related. Lexow had also discovered information concerning a sale of stock which gave the appearance of having produced a large capital gain, but had been reported as a loss. By this time Lexow's investigation had also broadened to cover Prudden's personal returns. Lexow made no report of these suspicions to his superiors at this juncture because he wanted to pursue the examination further.

A number of times during Lexow's audit Prudden told him that if they found anything wrong, he, Prudden, wished that Lexow would let him know so that it could be corrected and any tax due could be paid. Prudden was particularly insistent that Lexow advise him on how to handle several details of a particular stock sale. Lexow testified that it was possible that he did tell Prudden that when all the facts were known to him he would advise Prudden how a 52,000 dollar escrow item connected with the stock sale should be handled, but Prudden admits he never got this advice.

When a revenue agent discovers indicia of fraud in the course of an examination, the routine procedure requires that he refer a complete report of his findings to the Intelligence Division of the revenue service,

which then determines whether it will assign a special agent to take charge of the case. On June 27, while Lexow's examination was continuing, he had his first discussions with other persons in his office about the possibility of referring the case to the Intelligence Division. Lexow began to write his referral report on July 3 and completed it on July 15. On July 9 he wrote Prudden requesting bank statements and canceled checks of Research and Development, Ltd., urging him to forward these documents to Lexow in order to save time and enable Lexow to proceed with his examination of FCA and its subsidiaries. He also complimented Prudden on his cooperation. A copy of this letter is set out in the margin.[1] It was not shown that Prudden ever furnished the documents requested to Lexow or his successors.

Lexow did not meet with Prudden or Mrs. Smith after July 9. On August 14, Lexow received advice from the Intelligence Division that it had decided to make a full-scale investigation. On August 29, after a telephone conversation with Mrs. Smith indicated that Prudden wanted a written request, Lexow wrote Prudden requesting that copies be made available to him of papers previously furnished but inadvertently left in the corporation's office. He also asked for a schedule which

---

[1] "Dear Mr. Prudden:

I presume that you have retrieved from storage the bank statements and canceled checks of Research and Development, Ltd.'s two bank accounts.

Please forward them to me in care of this office. By doing so, we will both benefit in that you will be saved a considerable amount of time upon your return to Florida and prior to your return, I will be able to proceed with my examination of F C A and subsidiaries.

You have been most cooperative in furnishing information and in giving of your time in connection with this examination; therefore, I feel sure that you will give your immediate attention to this matter.

Sincerely."

the proper scope of Lexow's examination. Lexow once told Prudden that the Internal Revenue Service would never leave him alone until he produced some records for Research and Development, Ltd. Prudden took the position that such records did not have to be produced and, as stated, he never produced them. On one occasion when Lexow raised a question as to constructive ownership with Prudden, Prudden told Lexow not to attempt to tell him about the rules of constructive ownership, that that subject had been his specialty in law school and he had studied it for three years. On several occasions Prudden told Lexow that he, Lexow, was simply on a fishing expedition—trying only to gather facts that would support Lexow's preconceived conclusions. In his final letter to Lexow, Prudden stated that he was left with the impression that items were being singled out of context in order to attack his intentions as unfair and not forthright. He pointed out that he had frequently asked for the Internal Revenue Service's views but had never received a stable answer of any kind. He further offered to review with Agent Stanley "whatever context he may wish to go over," expressly including the summary of losses sustained due to activities of the unfaithful employee, which Lexow had previously requested.

On September 13, 1963, Revenue Agent Lewis E. Stanley wrote Prudden confirming a meeting on October 1, 1963 in Palm Beach. Although the letter did not mention him, Special Agent Cohen attended and did meet with Prudden and Stanley. When Cohen and Stanley opened the meeting they identified themselves to Prudden as a special agent and a revenue agent respectively, and showed him their written credentials, which he examined. Cohen's credentials plainly carried the legend "Intelligence Division." Prudden testified

that he did not know the significance of Cohen's designation as a special agent. They informed Prudden that they were there to make an audit and examination of his returns, the returns of his three sons and the returns of FCA and its eight subsidiaries. He was also told that the examination would include any other corporation or gift tax returns that he had filed. Neither Stanley nor Cohen ever stated to Prudden that a criminal investigation was being conducted or that the investigation they were making was being made to determine the possibility of fraud. Prudden was never given any warning nor was he ever advised that he had a right to remain silent or that any information furnished by him could be used against him in any subsequent proceedings. All actions and procedures followed by Stanley and Cohen were in accord with what was then the Internal Revenue Service's standard procedure in such cases.

On December 21, 1964, Revenue Agent Stanley and Special Agent Cohen interviewed Prudden at the Internal Revenue Service Intelligence Division office. Prudden answered the questions asked him but refused to allow the conversation to be recorded. All other meetings between Prudden and the IRS agents were at Prudden's office at his convenience during regular business hours. The work of Special Agent Cohen and Agent Stanley extended over a period of some fifteen months. Prudden persisted in refusing records of the Bahamian corporation and records outside the years he felt were properly open. He continued to complain that the agents were fishing and criticized third-party investigations, but he also continued to cooperate within these limits with the agents' requests for information and records during the entire period.

I. NECESSARY WARNINGS AND ADVICE

Prudden contends that the evidence obtained after Special Agent Cohen entered the investigation must be suppressed because he, Prudden, was not warned and advised of his rights according to Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).[1] We adhere to our prior rulings and reject this contention.[2] However, the Supreme Court's ruling in Mathis v. United States, 391 U.S. 1, 88 S.Ct. 1503, 20 L.Ed.2d 381 (1968) reversing this court and holding that routine tax investigations are not immune from the *Miranda* requirements for warnings to be given to a person in custody, and two recent decisions from the Seventh Circuit which reach a result contrary to ours here, indicate that we make a detailed review of this issue.

A recurrence to the constitutional foundation is al-

---

[1] Although the evidence in question was obtained prior to the decision in *Miranda*, the Supreme Court applied that decision to persons whose trials had not begun as of June 13, 1966, regardless of when the alleged constitutional infirmity occurred. Johnson v. New Jersey, 384 U.S. 719, 734, 86 S.Ct. 1772, 1781, 16 L.Ed.2d 882 (1966). In Jenkins v. Delaware, 395 U.S. 213, 89 S.Ct. 1677, 23 L.Ed.2d 253 (1969), the Court limited the retroactivity of the rule by refusing to apply it to retrials commenced after the date of the decision even though the original trial preceded *Miranda*. It is appropriate to here note that the District Court was under the impression that Prudden did not rely on *Miranda* and the order suppressing evidence was expressly declared to be independent of any application of *Miranda* to the instant case. The constitutional dimensions of that rule and the fact that this cause must be demanded for further proceedings where the point might be raised, indicate that we should rule on it now.

[2] United States v. Dickerson, 413 F.2d 1111 (7th Cir. 1969), and United States v. Habig, 413 F.2d 1108 (7th Cir. 1969), cert. den., 396 U.S. 1014, 90 S.Ct. 559, 24 L.Ed.2d 506 (1970). (The *Miranda* issue was not presented to the Court in the Application for Writ of Certiorari.). See also United States v. Campione, 416 F.2d 486 (7th Cir. 1969).

ways an appropriate beginning point. The Fifth Amendment's mandate is that no person shall be "compelled in any criminal case to be a witness against himself, * * *."

Compulsion, a requisite to the invocation of the Amendment's protection against self-incrimination, was not attenuated in *Miranda*. The majority opinion in *Miranda* is complex and lengthy but the following pertinent extracts highlight the problem presented and explain the controlling principles. In the preface the court epitomized the decision's meaning thusly:

> "Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

(384 U.S. at 444, 86 S.Ct. at 1612.)

Part I began with the following paragraph:

> "The constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way. In each, the defendant was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world. In none of these cases was the defendant given a full and effective warning of his rights at the outset of the interrogation process. In all the cases, the questioning elicited oral admissions, and in three of them,

signed statements as well which were admitted at their trials. They all thus share salient features—incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights."

(384 U.S. at 445, 86 S.Ct. at 1612)

The Court continued by pointing out that sophisticated psychological techniques had been developed by police to supplant the oft condemned use of physical force to extort confessions, the key to which called for isolating suspects from familiar surroundings and friends. It distilled the new techniques this way:

"From these representative samples of interrogation techniques, the setting prescribed by the manuals and observed in practice becomes clear. In essence, it is this: To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist."

(384 U.S. at 455, 86 S.Ct. at 1617)

and concluded thusly:

"In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures. The potentiality for compulsion is forcefully apparent, * * *. It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation."

(384 U.S. at 457, 86 S.Ct. at 1618)

Part II traced the history of the privilege, its embodiment in our Constitution and its subsequent court implementations down through Escobedo v. Illinois, 378

U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964), with this application of the latter's rationale:

> "The entire thrust of police interrogation there, as in all the cases today, was to put the defendant in such an emotional state as to impair his capacity for rational judgment. The abdication of the constitutional privilege—the choice on his part to speak to the police—was not made knowingly or competently because of the failure to apprise him of his rights; the compelling atmosphere of the incustody interrogation, and not an independent decision on his part, caused the defendant to speak."

(384 U.S. at 465, 86 S.Ct. at 1623)

Part III demonstrated how the rule announced was to be employed and detailed the justification for tendering an attorney's advice. It closed with this caveat:

> "Our decision is not intended to hamper the traditional function of police officers in investigating crime. See Escobedo v. State of Illinois, 378 U.S. 478, 492, 84 S.Ct. 1758, 1765. When an individual is in custody on probable cause, the police may, of course, seek out evidence in the field to be used at trial against him. Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present."

"'"The distinction and its significance has been aptly described in the opinion of a Scottish court;

'In former times such questioning, if undertaken, would be conducted by police officers visiting the house or place of business of the suspect and there questioning him, probably in

"In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influence is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today."

(384 U.S. at 477, 478, 86 S.Ct. at 1629-1630)

[1] In Mathis v. United States, supra, the taxpayer was convicted of tax fraud on the basis of evidence elicited by a regular revenue agent on a routine investigation made while the taxpayer was in prison for an unrelated crime. The Supreme Court reversed our affirmance of the conviction because the prisoner had not been given the *Miranda* warnings. Although *Mathis* makes it clear that *Miranda* is potentially applicable to any tax investigation; it most definitely does not require *Miranda* warnings in all tax investigations. *Mathis* in no way diminishes the necessity for showing

---

the presence of a relation or friend. However convenient the modern practice may be, it must normally create a situation very unfavourable to the suspect.' Chalmers v. H. M. Advocate [1954] Sess.Cas. 66, 78 (J.C.)."

We held that routine tax investigations were not criminal in nature, and thus were beyond the protection of the Fifth Amendment without regard to the presence or absence of compulsion. Mathis v. United States, 376 F.2d 595 (5th Cir. 1967).

actual or inherent compulsion to self-incrimination. Mathis was not merely at the station house, he was imprisoned for a fixed term. He was deprived of his liberty in a most positive way. Thus when the court established that the type of inquiry there present was not determinative, the result was necessarily a finding of Fifth Amendment violation.

"In our view, the Seventh Circuit's recent opinion in United States v. Dickerson, supra, which petitioner urges we now adopt, is an unwarranted extension of the *Miranda* decision. *Dickerson* held that *Miranda* warnings must be given a taxpayer at the inception of first contact with him following the transfer of a tax case to the Intelligence Division. The facts recited in that opinion show no element of custody or restraint —no deprivation of freedom—no compelling atmosphere—only a visit by a regular and a special agent of the Internal Revenue Service to defendant at his place of business. The opinion stated:

> "We understand the teaching of *Miranda* to be that one confronted with governmental authority in an adversary situation should be accorded the opportunity to make an intelligent decision as to the assertion or relinquishment of those constitutional rights designed to protect him under precisely such circumstances." 413 F.2d at 1114.

Thus, the court inferred compulsion from the fact that the investigators represented "governmental authority in an adversary situation." Such a rule is over broad and we expressly decline to follow it.

[2] We cannot agree that every administrative official who confronts a citizen with a request for information that might disclose criminal conduct, thereby exerts a compulsion on the citizen that must be dispelled by the *Miranda* placebo. In today's vast and

complex network of widespread daily administrative contacts between citizens and government officials, such a holding would open a veritable Pandora's box. When a census taker returns to recheck information he has received or a building inspector comes to investigate a report of noncompliance with provisions of the city housing code or a game warden who hears shooting out-of-season stops a man he finds in the woods or a bank examiner questions a teller whose figures are out of balance, would each then have to give the *Miranda* warnings? In each case a governmental official is confronting a citizen and criminal charges may result. There are a thousand and one administrative inquiries routinely made every day in every city which could evoke responses that might form a part of the basis in proof for a charge of perjury, falsification of records, failure to file a report or perform a legal duty or other criminal conduct. Most of these routine administrative confrontations would be rendered ineffective to the citizen and his government by imposing *Miranda* requirements. Indeed, if the warning became too commonplace, the very purpose of its requirement could be undermined. If "authority" were allowed to supplant custody—the deprivation of freedom—as the determinant of compulsion, even these routine field investigations which *Miranda* expressly exempted must fall. Under such a rule a policeman upon stopping a motorist could not ask to see his license without warning him and advising him in full.* It is not for this Court to so extend *Miranda*, and we are particularly unwilling to extend it to an adult experienced businessman.

*Cf. United States v. Marlow, 423 F.2d 1064 (5th Cir. 1970), where a routine request for a driver's license made without *Miranda* warnings produced a wrongfully acquired credit card that led to the driver's conviction for obstructing the mails.

a law school graduate, who for over a year voluntarily furnished selected corporate and personal records to tax agents—not claimed to be overbearing but overkind.[10]

The records shows that Prudden's interviews with all the agents were on generally amicable terms—what Prudden described as "a normal business arrangement." He limited the information he gave the agents, specifically refusing to give them requested information from years not under examination and the records of the Bahamian subsidiary. He testified that he was never threatened. He even testified that Lexow once told him that the Internal Revenue Service would not leave him alone unless he produced the Bahamian company records, yet he never produced them. There was simply no factual support for a contention that Prudden was put in such an emotional state as to impair his capacity for rational judgment.

---

[10]There are other incongruities in *Dickerson*. It purports to apply *Mathis* but admittedly does not use *Mathis*' standard. In *Mathis* a routine examination by a regular revenue agent prior to any reference of the case to the Intelligence Division of the Revenue Service, was voided. *Dickerson* does not apply this rule, it admits incriminations by the taxpayer produced by the regular agent and only suppresses information obtained after the case had been transferred to the Intelligence Division. Since *Mathis* did not recognize any distinction between the regular and special agent, the compulsive effect of the agent's official status is identical. Unless the regulations of the Internal Revenue Service are changed or United States v. Heffner, infra n. 12, is not followed, *Dickerson* will have no effect as precedent. Prior to its rendition, the Revenue Service adopted a regulation requiring special agents to give *Miranda* type warnings on their first contact with taxpayers. In recognition of the fact that *Dickerson* represented a departure from the present state of the law, the court determined that its holding would only apply to interrogations taking place after the date of the decision. Thus only *Dickerson* and the taxpayer in the companion case of *Habig* will be affected. If Prudden's case were now presented to that circuit he would get no benefit from that ruling since the investigations here involved took place in 1963 and 1964.

Moreover, there is no evidence that the incriminating evidence was coerced as a matter of law; i.e., was the result of in-custody interrogation or anything approaching comparable pressures.[11] None of the evidence that Prudden seeks to suppress was obtained while he was under arrest or under any sort of actual or implied restraint. In fact, Prudden's fraud, deceit and trickery contentions strongly militate against any thought of pressure. The basic thrust of this other contention is that the agents were too nice to him. He was never deprived of his freedom in any significant way during the questioned interviews, all but one of which took place at his own office at his convenience during regular office hours.[12] The one interview which occurred

---

[11]The Supreme Court in *Miranda*, defined custodial interrogation to mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom in any significant way. The Court also emphasized that the "salient features" of the cases there decided showed "incommunicado interrogation of individuals in a police-dominated atmosphere." 348 U.S. at 445, 86 S.Ct. at 1612.

[12]We recognize that custodial interrogation can occur beyond the confines of the station house. For example, in Orozco v. Texas, 394 U.S. 324, 89 S.Ct. 1095, 22 L.Ed.2d 311 (1969), the Court applied *Miranda* to incriminating evidence obtained by questioning the suspect in his own room in a boarding house. The suspect was alone and in the custody of four police officers who questioned him. Under those circumstances, Orozco was held to be significantly deprived of his freedom. But *Orozco* merely stands for the rule that "a compelling atmosphere" can exist outside of the station house, it does not hold that any inquiry by a government official carries such an element of intimidation as amounts to compulsion to self-incrimination. The majority opinion emphatically states: "We do not, as the dissent implies, expand or extend to the slightest extent our *Miranda* decision." See also United States v. Lackey, 413 F.2d 655 (7th Cir. 1969), where a recorded courthouse basement interrogation of the taxpayer alone was held to be within *Miranda's ambit*. No comparable significant deprivation of freedom or compelling atmosphere ever existed in the case now before us.

—A-33—

not a special agent not only conflicts with *Mathis* but is not apropos to the point he makes. Regular agents frequently obtain evidence which later forms one or more links in the chain which affixes criminality to the acts of a tax evader.

Marcus v. United States, 422 F.2d 752 (5th Cir., 1970) is our latest decision which discusses this question. Marcus was convicted for failing to file individual tax returns. One ground of his appeal was that he had not been given *Miranda* warnings nor expressly told of the criminal nature of the investigation by special agents of the Internal Revenue Service until after he had supplied records and made damaging admissions. Marcus contended, as Prudden now does, that *Miranda* applied to noncustodial tax fraud investigations. We rejected this contention with the statement: "In a criminal tax fraud case, this Court has recently held that the *Miranda* doctrine applies only to in-custody interrogation. Agoranos v. United States, 5 Cir., 1969, 409 F.2d 833. Since [the taxpayer] was at no time in cus-

---

"The facts in *Marcus*, which was decided after the instant appeal was argued, do differ from the case sub judice. In the words of that opinion:

> "There is testimony in the record * * * that at the first interview the Internal Revenue agents informed Marcus that they were Special Agents attached to the Intelligence Division, which handles only criminal investigations, that he had a right to remain silent, and that anything he said could be used against him. Likewise, it is undisputed that the agents failed to inform Marcus that he had a right to an attorney, as they were required to do if Marcus was entitled to a *Miranda* warning." 422 F.2d at 756.

These factual differences do not serve to distinguish *Marcus*. The rights protected by *Miranda* are constitutional in nature and if *Miranda* warnings and advices are required at all, they are all required for unconstitutionality knows no gradations.

tody during the Internal Revenue Service investigation, the contention is without merit."[17]

Two recent cases before this court, United States v. Roundtree, 420 F.2d 845 (5th Cir. 1969) and Stuart v. United States, 416 F.2d 459 (5th Cir. 1969), concerned a related but distinguishable question. Those taxpayers claimed that enforcement of an Internal Revenue Service administrative summons would compel them to incriminate themselves. In those cases we recognized that a routine tax investigation may be criminal in nature. In *Roundtree* we stated that if the taxpayer can show that the proceeding had become an inquiry with dominant criminal overtones, he would be entitled to raise Fifth Amendment objections. Compulsion was present in *Roundtree* and *Stuart* in the form of the subpoena and the single remaining element necessary to invoke the Fifth Amendment's protection was the claim of self-incrimination. Even if Prudden could show that the inquiry into the tax liability of the corporation, himself and his family was one with dominant criminal overtones, he would fail to bring himself within Miranda's ambit because he cannot show compulsion.

II. THE CLAIM OF FRAUD, DECEIT AND TRICKERY

[5] The trial judge suppressed all evidence obtained on or after the day when Lexow referred the case to the Intelligence Division because he found that the Internal Revenue Service agents engaged in a deliberate scheme to deceive Prudden in order to prevent his suspecting that the nature of the investigation had altered materially.[18] Here the ultimate fact determination was reached by a process of reasoning from undis-

[17] 422 F.2d at 756.

[18] 305 F.Supp. at 111.

puted evidentiary facts. After a careful review of the entire record, we conclude that ultimate fact finding—fraud, deceit and trickery by the agents—is a mistaken one.[19] We are left with the definite and firm conviction that this finding is in error.[20]

Because of the holding we make here it is unnecessary to discuss the breadth of the suppression order, reaching as it did not just personal records but corporate records in corporations with which Prudden was connected only as a director or an employee. No claim of privilege as to self-incrimination relative to this type of third party records has previously been recognized. *See, e. g.*, Hale v. Henkel, 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652 (1906); Fineberg v. United States, 393 F.2d 417 (9th Cir. 1968); Hensley v. United States, 406 F.2d 481 (10th Cir. 1968).

[6] If the evidence obtained subsequent to Special Agent Cohen's entry into the investigation were the result of an unreasonable search in violation of the Fourth Amendment, then it would have to be suppressed. Prudden also asserts violation of Fifth and Sixth Amendment rights. Since all claimed violations depend upon a showing of the existence of fraud, deceit or trickery, it is not necessary to discuss each constitutional claim separately. Prudden postulates that the search was unreasonable because his consent to examine the records was obtained by fraud, deceit and trickery. While we recognize that fraud, deceit or

[19] Galena Oaks Corporation v. Scofield, 218 F.2d 217 (5th Cir. 1954); Mayo v. Pioneer Bank & Trust Co., 297 F.2d 392 (5th Cir. 1961).

[20] United States v. United States Gypsum Co., 333 U.S. 364, 394-395, 68 S.Ct. 525, 541-542, 92 L.Ed. 746 (1948); United States v. Singer Mfg. Co., 374 U.S. 174, 194 n. 9, 83 S.Ct. 1773, 1784 n. 9, 10 L.Ed.2d 823 (1963); Minneapolis-Moline, Inc. v. Bryan, 415 F.2d 841 (5th Cir. 1969).

trickery in obtaining access to incriminating evidence can make an otherwise lawful search unreasonable.[21] Prudden, as the moving party in the motion to suppress, did not sustain the burden that was his of demonstrating that fraud, deceit or trickery were present.[22]

The essence of Prudden's contention and the finding of the trial court is that the circumstances surrounding the transformation of the investigation into one with increased possibilities of resultant criminal charges without Prudden's knowledge, required suppression of the evidence.[23] Just how Prudden was defrauded, deceived or tricked is what we fail to perceive. Certainly, if the agents had given Prudden the full panoply of *Miranda* warnings, and advice, he could not make such a claim. *Miranda* warnings, however, were not required. So what were the agents required to do or leave undone or say or let go unsaid that discloses the fraud, deceit and trickery? They told him they wanted to audit and examine records in his possession relating to tax returns. They pursued this announced intention in what Prudden describes as a businesslike way at intervals over many months, despite his occasional expressions of discontent. We are unable to say that they

---

[21] Gouled v. United States, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647 (1921); Spahr v. United States, 409 F.2d 1303 (9th Cir. 1969), cert. den., 396 U.S. 840, 90 S.Ct. 102, 24 L.Ed.2d 91 (1969); United States v. Sclafani, 265 F.2d 408 (2d Cir.), cert. den., 360 U.S. 918, 79 S.Ct. 1436, 3 L.Ed.2d 1534 (1959). We explicitly reject the government's contention that the agents were free to use fraud, deceit or trickery. In cases where the IRS agents are obtaining consent to examine documents, they cannot gain such consent by affirmatively misrepresenting the nature of the search.

[22] Nardone v. United States, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed.2d 307 (1939); Der Garabedian v. United States, 372 F.2d 697 (5th Cir. 1967).

[23] 305 F.Supp. at 111.

had a duty to do more or less under the circumstances disclosed by this record.

[7] Prudden points to the failure of Special Agent Cohen to tell him that his function was to investigate for criminal fraud. All Cohen was required to do by the then existing Internal Revenue Service requirements was to tell Prudden that he was a Special Agent and show Prudden his credentials. This he did. He in no way concealed his true identity. He could not have affirmatively mislead Prudden as to the function of the Intelligence Division or as to the duties of a special agent, since neither of these subjects were ever discussed. Silence can only be equated with fraud where there is a legal or moral duty to speak or where an inquiry left unanswered would be intentionally misleading.[24] None of these factors were present here.

In Spahr v. United States, supra note 21, one ground of taxpayer's appeal of his conviction for corporate tax evasion was that incriminating evidence was procured through guile and fraud. Allegedly the revenue agents fraudulently concealed the true purpose of their investigation. As in the instant case, two agents merely identified themselves as a special agent and a revenue agent, respectively, without giving any additional warnings. The Ninth Circuit found no deception. Quoting the Second Circuit's opinion in United States v. Sclafani, supra note 21, they said:[25]

"A 'routine' tax investigation openly commenced

[24] *See* United States v. Sclafani, 265 F.2d 408 (2d Cir.), cert. den., 360 U.S. 918, 79 S.Ct. 1436, 3 L.Ed.2d 1534 (1959); *c. f.*, Avery v. Cleary, 132 U.S. 604, 10 S.Ct. 220, 33 L.Ed. 469 (1890); Atilus v. United States, 406 F.2d 694, 698 (5th Cir. 1969); American Nat'l Ins. Co., etc. v. Murray, 383 F.2d 81 (5th Cir. 1967).

[25] 409 F.2d at 1306, *quoting*, 265 F.2d at 414-415.

> as such is devoid of stealth or deceit because the ordinary taxpayer surely knows that there is inherent in it a warning that the government's agents will pursue evidence of misreporting without regard to the shadowy line between avoidance and evasion, mistake and willful omission."

In *Sclafani*, as in the instant case, the taxpayer objected that records obtained from him after the "routine audit" commenced by a revenue agent was turned over to a special agent should have been suppressed because they were obtained through stealth and deceit. The court found no fraud or deceit and stated:[26]

> "The Fourth Amendment does not require more than this, that when his consent is sought the taxpayer be apprised of the government's concern with the accuracy of his reports, and therefore of such hazards as may be incident to a voluntary disclosure. We hold that Sclafani was so apprised by the warning inherent in the request when Agent Sonkin identified himself and disclosed his purpose to audit certain returns of the corporation."

[8] We conclude that the mere failure of a revenue agent (be he regular or special) to warn the taxpayer that the investigation may result in criminal charges, absent any acts by the agent which materially misrepresent the nature of the inquiry, do not constitute fraud, deceit and trickery. Therefore, the record here must disclose some affirmative misrepresentation to establish the existence of fraud, and this showing must be clear and convincing.[27]

---

[26] 265 F.2d at 415. *See* United States v. Squeri, 398 F.2d 785, 788 (2d Cir. 1968): "[T]he information that a taxpayer's returns are under audit gives notice of the possibility of criminal prosecution regardless of whether the agents contemplate civil or criminal action when they speak to him."

[27] Jett v. Zink, 362 F.2d 723, 729 (5th Cir. 1966), cert. den., Chamberlain v. Zink, 385 U.S. 987, 87 S.Ct. 597, 17 L.Ed.2d 448 (1967).

Prudden points to several incidents to establish the existence of affirmative misrepresentations by the Internal Revenue Service agents. He does not in any of these, however, establish fraud by clear and convincing proof, rather the evidence tends to show that fraud was not present.

Audit and Examination. Prudden seeks to distinguish *Spahr* and *Sclafani* because in those cases no affirmative acts of misrepresentation were shown. On the other hand, Prudden claims that Cohen's statement at the hearing that "we informed Mr. Prudden that we had come for an audit and examination of his returns—his son's returns, and the returns of the Florida Corporation of America and its eight subsidiaries" was affirmative misrepresentation in the case at bar. Telling Prudden that an audit and examination were to take place is not deceptive. That is exactly what the agents did. They audited and examined his books. That in so doing they uncovered incriminating evidence does not change the character of the investigation they undertook. Audit and examination is but one means of gathering evidence in a tax fraud case. Since the agents did not have to warn him directly that they were undertaking a criminal investigation, then telling him the means by which they were to gather evidence in no way is misleading.

Letters from Lexow to Prudden. Prudden contends that the two letters from Lexow fraudulently misrepresented the nature of the inquiry. The July 9th letter, which was written before the Intelligence Division came into the case but while Lexow was preparing to refer it to them, asked Prudden to send records of one of FCA's subsidiaries to him in order to facilitate his

examination and to save Prudden time." There are no misrepresentations of fact in the letter. Even if the letter had been misleading, Prudden complains of no evidence obtained as a result of it. In fact, the record does not show that he ever complied with the letter's request. Furthermore, the trial court's suppression order only applied to evidence obtained on or after August 14, a full month after the writing of the letter.

The second letter was written on August 28," two weeks after the referral of the case to the Intelligence Division without advising him of any change in the nature of the investigation. There is no evidence of guile by Lexow. He testified that he was only conscientiously trying to leave a complete record of all the facts he had previously accumulated for his successor. The documents he requested were those which Prudden had already authorized him to copy, but he had inadvertently left them in Prudden's office. Thus, nothing new was added to the government's case. Furthermore, the evidence received pursuant to this letter was excepted from the suppression order by the trial court, to which Prudden did not object. Secondly, Prudden contends that the letter was deceptive since Lexow's reference to the transfer of the case to Revenue Agent Stanley was calculated to raise no suspicion and specific mention that Special Agent Cohen of the Intelligence Division would henceforth be in charge of the investigation was omitted. Lexow testified that his omission of the Special Agent's assignment to the case was not made because he was afraid of the flow of information would be cut off. The only possible harm in this letter would be that Prudden would think that the entry into the case of a different agent was of no sig-

"This letter is set out at note 3 *supra*.
"This letter is set out at note 4 *supra*.

significance. Whatever momentary misapprehension in this direction that was left in Prudden's mind by the letter should have been quickly dispelled by the actual appearance not only of Revenue Agent Stanley but also Special Agent Cohen. In place of one neophyte, two experienced agents appeared and persisted in an examination and audit for fifteen months. At any rate, this contention falls far short of persuading us that the letter was fraudulent.

Friendliness of the Agents. Prudden argues that the nature of the investigation was concealed because of the friendliness and cordiality of the relationship between himself and the agents. Most of the evidence he cites as proof of deceit through cordiality is with regard to Lexow. Here again we are reminded that none of the information gathered by Lexow is subject to suppression. Even with regard to the more business-like attitudes adopted by Cohen and Stanley, we perceive no possible subterfuge. We can see no reason why civil servants should be required in their daily dealings to assume an uncivil character just because they are in a position to discover criminality on the part of a citizen. That would be a poor form of warning at best. If direct warnings are unnecessary, then requiring circuitous warnings by the manner of action of the agents is irrational. Furthermore, the tone of every interpersonal relationship is subject to the control of all the parties. Prudden's own conduct was a necessary ingredient of the amicable relationship of which he now complains. It may well be that kindness on a taxpayer's part could be calculated to dispel an agent's suspicions or to help to persuade him to see the results of his investigation in the most favorable light. By this we only mean to observe that "it takes two to tango."

Promises and Advice. Prudden further argues that promised advice from the agents, another manifestation of their "deceptive" cordiality, was fraudulent. He first claims that Lexow said that he would advise him on how to handle one feature of a particular stock sale involving a 52,800 dollar escrow account. Lexow promised Prudden an answer when he knew all the facts. But Lexow left the investigation without giving Prudden any answer. So Lexow's promise was not deceitful. Prudden also pressed Cohen and Stanley for advice in regard to the same transaction but admits that he got no "recognizable answer." The long and short of this is that none of the agents ever gave him any advice on the escrow transaction. How could this deceive him? Prudden also claims that the failure of the agents to advise him that he should file an amended return in 1963 was misleading. He asked Cohen if he should file an amended return and was told that the agents would consider only his original return in preparing their report. This is no more than a factual statement. It was not shown to be false or deceitful.

Cumulative Misrepresentations. The explication of a case in factual and legal segments can distort the overall picture of what really happened. Therefore, we have carefully reviewed the record as a whole but still cannot find that Prudden sustained his burden of proving fraud, deceit and trickery. Goodman v. United States, 285 F.Supp. 245 (C.D.Cal.1968), which was relied on by the District Court is distinguishable. Most noticeably, in that case the taxpayer had only a grammar school education and was affirmatively led to believe that the information which he was giving the revenue agents was part of the investigation of another taxpayer. That is not near this case on either count.

IN THE

SUPREME COURT OF THE UNITED STATES

No._____

October Term, 1970

* * *

JOE H. TONAHILL,

Petitioner

v.

THE UNITED STATES OF AMERICA,

Respondent

* * *

CERTIFICATE OF SERVICE

I hereby certify that in accordance with Rule 33 of the Rules of this Court, on the 10 day of September, 1970, three copies of the Petition for Writ of Certiorari were mailed, air mail, postage prepaid, to the Solicitor General, United States Department of Justice, Washington, D. C. 20530, and three additional copies to Mr. Johnnie M. Walters, Assistant Attorney General, Tax Division, United States Department of Justice, Washington, D. C. 20530. I further certify that all parties required to be served have been served.

Sander W. Shapiro

SANDER W. SHAPIRO
P. O. Box 1148
Austin, Texas 78767

Counsel for Petitioner

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	5
Conclusion	11

CITATIONS

Cases:

Agorianos v. *United States*, 409 F. 2d 833, certiorari denied, 396 U.S. 824	7
Biggs v. *United States*, 246 F. 2d 40	8
Bumper v. *North Carolina*, 391 U.S. 543	5, 6
Cohen v. *United States*, 405 F. 2d 34, certiorari denied, 394 U.S. 943	7
Feichtmeir v. *United States*, 389 F. 2d 498	7
Gouled v. *United States*, 255 U.S. 298	9
Grant v. *United States*, 291 F. 2d 227, vacated, 369 U.S. 401	6
Hensley v. *United States*, 406 F. 2d 481	7
Judd v. *United States*, 190 F. 2d 649	6
Miranda v. *Arizona*, 384 U.S. 436	2, 6, 7
Morgan v. *United States*, 377 F. 2d 507	6
Turner v. *United States*, 222 F. 2d 926, certiorari denied, 350 U.S. 831	8
United States v. *Campione*, 416 F. 2d 486, certiorari denied, 397 U.S. 909	8
United States v. *Dickerson*, 413 F. 2d 1111	7, 8
United States v. *Frank*, 245 F. 2d 284, certiorari denied, 355 U.S. 819	8
United States v. *Gallagher* (C.A.7, No. 18,000), decided July 9, 1970	8
United States v. *Haden*, 397 F. 2d 460	6

496-318—70

Cases—Continued

	Page
United States v. *Jaskiewicz* (No. 18,387, C.A.3), decided September 28, 1970	7
United States v. *Mancuso*, 378 F. 2d 612, certiorari denied, 390 U.S. 955	7
United States v. *Miriani*, 422 F. 2d 150, certiorari denied, 399 U.S. 910	7
United States v. *Neves*, 269 F. Supp. 158	6
United States v. *Pate*, 324 F. 2d 934	6
United States v. *Prudden*, 424 F. 2d 1021, certiorari, denied October 12, 1970, No. 453, this Term	6, 8, 9
United States v. *Remolif*, 227 F. Supp. 420	6
United States v. *Sclafani*, 265 F. 2d 408, certiorari denied, 360 U.S. 918	8, 9
United States v. *Townsend*, (C.A. 7, No. 18, 159), decided July 9, 1970 pending on petition for certiorari, No. 708, Oct. 7, 1970	8
United States v. *White*, 417 F. 2d 89, certiorari denied, 397 U.S. 912	6–7
Zacher v. *United States*, 227 F. 2d 219, certiorari denied, 350 U.S. 993	8
Statutes and regulations:	
18 U.S.C. (Supp. V) 3731	2, 5, 10
28 U.S.C.:	
Sec. 506	10
Sec. 510	10
28 C.F.R. 0.70	10
Miscellaneous:	
Internal Revenue Service News Release, November 26, 1968, 1968 CCH Fed. Tax Reporter, par. 6946, 1968 Prentice-Hall Fed. Taxes, par. 55, 576	7

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 672

JOE H. TONAHILL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. A10–A14) reversing the suppression order of the district court is not yet reported. The opinion of the district court (Pet. A1–A7) is reported at 308 F. Supp. 97.

JURISDICTION

The judgment of the court of appeals was entered July 13, 1970 (Pet. A9, A10) and a petition for rehearing was denied August 13, 1970 (Pet. A15). The petition for a writ of certiorari was filed September 10, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the burden of proof in this suppression action rested upon petitioner, the movant, to show that Treasury agents obtained his books and records by misrepresentation.

2. Whether the Treasury agents were required to give petitioner the full *Miranda* warnings of his constitutional rights as soon as criminal prosecution became a possibility, even though he was not in custody or deprived of his freedom of action in any significant way.

3. Whether Treasury agents have a duty to warn a taxpayer that their investigation into his civil tax liability has taken on criminal aspects.

4. Whether the decision below rests upon an unwarranted rejection of the district court's findings of fact.

5. Whether under 18 U.S.C. 3731 the court of appeals had jurisdiction of this appeal where the required certification was not signed by the United States attorney for the particular district, but by the duly authorized subordinate of the Assistant Attorney General in Washington under whose supervision the case was being handled.

STATUTE INVOLVED

18 U.S.C. (Supp. V) 3731:

> An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:
>
> * * *
>
> From an order, granting a motion for return of seized property or a motion to suppress evi-

dence, made before the trial of a person charged with a violation of any law of the United States, if the United States attorney certifies to the judge who granted such motion that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of the charge pending against the defendant.

STATEMENT

Petitioner is under indictment for wilfully attempting to evade substantial individual income tax for the years 1960, 1961 and 1962, in violation of Section 7201 of the Internal Revenue Code (App. 8–10).[1] Before trial, he moved to suppress documentary evidence (consisting of his books and records of income and expenses) alleging that the Treasury agents obtained such evidence from him in violation of the Fourth, Fifth and Sixth Amendments to the Constitution (App. 11–17). After an evidentiary hearing the district court issued a Memorandum Opinion and Order (App. 18–25; Pet. A1–A7) suppressing all evidence received by the agents from petitioner or his accountant, and all evidence obtained through leads from such evidence.[2] The court of appeals reversed.

The district court's findings of fact may be summarized as follows:

Petitioner is a lawyer of wide reputation, with considerable expertise in criminal cases, who has resided

[1] References to the Appendix in the court below will be designated "App."

[2] The district court had earlier denied the motion to suppress after hearing the testimony of petitioner and his accountant (App. 5).

and practiced in
years. The
tioner's
ner, who
October of
amination
only about
petitioner
taxes.
to the
where it
(App.
No
1964 until
Loventhal
Loventhal,
cial
detailed
1962" and
had
reason
could
importance
nor his
"Special
tax matters.
The
must
not aware
Both
they were
and whether

The agents never replied specifically that "fraud" or a "crime" was involved, but stated that "their function was to reconcile the large discrepancies, to see if they were the result of innocent errors." (Pet. App. A3.)

On the basis of these findings, the district judge concluded that the actions of the agents amounted to "affirmative fraud, trickery and deceit." (Pet. App. A4.) He ordered all evidence received by the agents from petitioner or his accountant, and all evidence obtained through leads from such evidence to be suppressed, including even the evidence originally obtained by the Revenue Agent before entry of the Special Agent into the investigation. (Pet. App. A6–A7.)

The government appealed under 18 U.S.C. 3731, arguing that the findings of fact were insufficient to support the district court's ultimate conclusion that suppression was called for and that that conclusion was clearly erroneous as a matter of law. The court of appeals agreed.

ARGUMENT

1. Petitioner attacks the court of appeals' holding that he had the burden of showing the agents obtained the books and records by misrepresentation. Of course, the burden of establishing that evidence should be suppressed rests upon the defendant. Petitioner relies, however, on the principle that when the defendant shows that a search and seizure did take place and that it was otherwise unlawful, the burden shifts to the government if it wishes to show that the search was justified by the defendant's consent. *Bumper v. North Carolina*, 391 U.S. 543. The underlying as-

sumption is that "'invitations' to enter one's house, extended to armed officers of the law who demand entrance, are usually * * * invitations secured by force," *Judd* v. *United States*, 190 F. 2d 649, 651 (C.A. D.C.); the facts of such cases are likely to be "instinct with coercion." *Bumper* v. *North Carolina*, *supra*, 391 U.S. at 550.

In this case, however, there was nothing inherently coercive about the agents' request to be allowed to examine the books and records, and the privacy of the home was not involved. Petitioner's only basis for transforming what occurred into a search and seizure is that the agents misled him into believing this was an ordinary civil tax investigation. And the court of appeals correctly required petitioner to prove this claim, thus considering the case analogous to the usual situation where the defendant has the burden of showing that an otherwise unlawful search and seizure took place. See *Grant* v. *United States*, 291 F. 2d 227, 229 (C.A. 2), vacated on another ground, 369 U.S. 401; *United States* v. *Haden*, 397 F. 2d 460, 465 (C.A. 7); *United States* v. *Pate*, 324 F. 2d 934, 935 (C.A. 7); *United States* v. *Remolif*, 227 F. Supp. 420, 423 (D. Nev.); *United States* v. *Neves*, 269 F. Supp. 158, 161 (S.D. N.Y.). See also, *Prudden* v. *United States*, certiorari denied October 12, 1970, No. 453, this Term.

2. Since petitioner was neither in custody, nor otherwise deprived of his freedom in any significant way, at the time he turned over the records, the constitutional requirements of *Miranda* v. *Arizona*, 384 U.S. 436, did not apply. *Morgan* v. *United States*, 377 F. 2d 507, 508 (C.A. 1); *United States* v. *White*, 417

F. 2d 89 (C.A. 2), certiorari denied, 397 U.S. 912; *United States* v. *Jaskiewicz* (No. 18,387, C.A. 3), decided September 28, 1970; *United States* v. *Mancuso*, 378 F. 2d 612, 619 (C.A. 4), certiorari denied, 390 U.S. 955; *Agoranos* v. *United States*, 409 F. 2d 833, 835 (C.A. 5), certiorari denied, 396 U.S. 824; *United States* v. *Miriani*, 422 F. 2d 150, 153–154 (C.A. 6), certiorari denied, 399 U.S. 910; *Cohen* v. *United States*, 405 F. 2d 34 (C.A. 8); certiorari denied, 394 U.S. 943; *Feichtmeir* v. *United States*, 389 F. 2d 498 (C.A. 9); *Hensley* v. *United States*, 406 F. 2d 481, 484 (C.A. 10). Petitioner contends that these decisions, including the holding in this case, are in conflict with *United States* v. *Dickerson*, 413 F. 2d 1111, 1117 (C.A. 7), a prosecution for wilful failure to file income tax returns, where the court held prospectively that *Miranda* warnings must be given "at the inception of the first contact with the taxpayer after the case has been transferred to the Intelligence Division."

In view of the prospective nature of the *Dickerson* holding in 1969 (after the evidence was turned over in this case) and the present policy of the Internal Revenue Service to give the equivalent of virtually full *Miranda* warnings to all taxpayers when they are first interviewed by a special agent,[3] there should be

[3] By news release dated November 26, 1968, the Internal Revenue Service announced that henceforth a special agent on his first visit to a taxpayer must warn him of his constitutional rights, including the right to counsel, but not including the proffer of legal aid unless the taxpayer is in custody. The news release notes that this "new procedure goes beyond most legal requirements that are designed to advise persons of their rights." 1968 CCH Fed. Tax Reporter, par. 6946; 1968 Prentice-Hall Fed. Taxes, par. 55,476.

few, if any, future cases that would meet a fate different in the Seventh Circuit than in any other circuit. See *e.g.*, *United States* v. *Campione*, 416 F. 2d 486 (C.A. 7), certiorari denied, 397 U.S. 909; *United States* v. *Townsend* (C.A. 7, No. 18,159), decided July 9, 1970, certiorari pending, No. 708, this Term; *United States* v. *Gallagher*, decided July 9, 1970 (C.A. 7, No. 18,000). The conflict, therefore, does not warrant further review by this Court, as the Court has repeatedly recognized in consistent denials of certiorari where a conflict with *Dickerson* has been relied upon.

3. The district court found that petitioner was given no warning when the agents' routine audit disclosed fraud, a disclosure auguring possible criminal prosecution, and petitioner relies on this finding here. But all that is necessary is that the taxpayer be advised that the examining agents are concerned with the accuracy of his returns. See *United States* v. *Sclafani*, 265 F. 2d 408, 414–415 (C.A. 2), certiorari denied, 360 U.S. 918; *United States* v. *Prudden*, 424 F. 2d 1021, 1031–1035 (Pet. A31, A35–A44) (C.A. 5), certiorari denied October 12, 1970, No. 453, this Term; *United States* v. *Frank*, 245 F. 2d 284, 286 (C.A. 3), certiorari denied, 355 U.S. 819; *Turner* v. *United States*, 222 F. 2d 926, 930–932 (C.A. 4), certiorari denied, 350 U.S. 831; *Biggs* v. *United States*, 246 F. 2d 40, 44 (C.A. 6); *Zacher* v. *United States*, 227 F. 2d 219, 225–226 (C.A. 8), certiorari denied, 350 U.S. 993. Inherent in that advice is the warning that the agents will pursue evidence of misreporting without regard to the

shadowy line between avoidance and evasion. *United States* v. *Sclafani, supra,* 265 F.2d at 414–415; *United States* v. *Prudden, supra* (see Pet. App. A39).

The district court also concluded that the agents practiced deceit on petitioner by emphasizing the civil aspects of their investigation and deemphasizing the criminal aspects. But since the agents were not obliged to warn of the possible criminal consequences, and since they answered petitioner's inquiries about the nature of their investigation with the statement that they were trying to reconcile the large discrepancies to see if they were the result of innocent errors (see p. 5, *supra*), the court of appeals correctly held (Pet. App. A13) that there was no material misrepresentation.[1]

4. Petitioner confuses findings of fact with conclusions of law by claiming that the decision below rests upon an unwarranted rejection of the district court's findings of fact. The difficulty was with the legal conclusion to be drawn from those facts and the court of appeals correctly held that the findings were clearly insufficient to support the district judge's ultimate conclusion. The agents never said their investigation could not lead to the bringing of criminal charges; indeed, petitioner was put on notice of just such a possibility when the agents told him they were trying to determine whether the large discrepancies were the result of *innocent* errors.

5. There is nothing to the contention that the court below lacked jurisdiction of this appeal because the

[1] This serves to distinguish *Gouled* v. *United States*, 255 U.S. 298, on which petitioner relies (Pet. 20).

certification required by 18 U.S.C. 3731 was not signed by the United States Attorney. An attorney of the Tax Division working under the supervision of the Assistant Attorney General for that division handled this case from the outset, the United States Attorney having asked to be relieved of responsibility for trial. In these circumstances, the requirement of 18 U.S.C. 3731 that the certification be signed by the "United States attorney" must mean the attorney for the United States who is responsible for the case; the purpose of the certification is to assure that the government attorney in charge is not appealing in order to delay proceedings.

Under the relevant statutes and regulations[5] the Attorney General had authority to relieve the United States Attorney of responsibility for the case, as he requested, and to place full responsibility for its conduct in the hands of other Department of Justice at-

[5] Section 510 of Title 28 provides that the Attorney General may make appropriate provisions to authorize the performance by any other officer, employee or agency of the Department of Justice of any function of the Attorney General. Section 506 provides that the "President shall appoint, by and with the advice and consent of the Senate, nine Assistant Attorneys General, who shall assist the Attorney General in the performance of his duties." Here the certification was signed in the name of the Assistant Attorney General in charge of the Tax Division by his duly designated subordinate. 28 CFR 0.70 places in that Assistant Attorney General (subject to the general supervision of the Attorney General) the responsibility for, *inter alia*, conducting, handling, or supervising "Criminal proceedings arising under the internal revenue laws" (with exceptions not here relevant) and appellate proceedings in connection with such criminal proceedings.

torneys, working under the supervision of the Assistant Attorney General in charge of the Tax Division. For purposes of this case, that Assistant Attorney General is the "United States attorney" and it was therefore proper that his name be signed to the certificate by a properly designated subordinate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ERWIN N. GRISWOLD,
Solicitor General.

JOHNNIE M. WALTERS,
Assistant Attorney General.

JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys.

OCTOBER, 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970

Supreme Court, U.S.
FILED
OCT 24 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. 672

JOE H. TONAHILL,
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY TO BRIEF OF THE RESPONDENT IN OPPOSITION

CLARK, THOMAS, HARRIS,
DENIUS & WINTERS
MARY JOE CARROLL
P. O. Box 1148
Austin, Texas 78767
A/C 512 472-8442
Of Counsel

SANDER W. SHAPIRO
P. O. Box 1148
Austin, Texas 78767
A/C 512 472-8442
Counsel of Record

Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002

INDEX OF AUTHORITIES

CASES	Page
Agoranos v. United States, 409 F.2d 833 (5th Cir. 1959), cert. den., 396 U.S. 824	7
Biggs v. United States, 246 F.2d 40 (6th Cir. 1957)	9, 10
Cohen v. United States, 405 F.2d 34 (8th Cir. 1968), cert. den., 394 U.S. 943	8
Evans v. United States, 377 F.2d 535 (5th Cir. 1967)	9
Feichtneir v. United States, 389 F.2d 498 (9th Cir. 1968)	8
Grant v. United States, 291 F.2d 227 (2nd Cir. 1961), vacated on another ground, 369 U.S. 401	5
Hensley v. United States, 406 F.2d 481 (10th Cir. 1968)	8
Kohatsu v. United States, 251 F.2d 898 (9th Cir. 1965), cert. den., 384 U.S. 1011	9
Mansfield v. United States, 381 F.2d 961 (7th Cir. 1967), cert. den., 389 U.S. 1015	8
Morgan v. United States, 377 F.2d 507 (1st Cir. 1967)	7
Prudden v. United States, 424 F.2d 1021 (5th Cir. 1970)	1, 3, 6, 11
Schlinsky v. United States, 379 F.2d 735 (1st Cir. 1967), cert. den., 389 U.S. 920	8
United States v. Agy, 374 F.2d 94 (6th Cir. 1967)	8
United States v. Frank, 245 F.2d 284 (3rd Cir. 1957), cert. den., 355 U.S. 819	9
United States v. Harrison, 265 F.Supp. 660 (D.C.N.Y. 1967)	10
United States v. Maius, 378 F.2d 716 (6th Cir. 1967), cert. den., 389 U.S. 905	8
United States v. Mancuso, 378 F.2d 612, 619 (4th Cir. 1967), cert. den., 390 U.S. 955	7

CASES	Page
United States v. Miranda, 422 F.2d 150 (6th Cir. 1970), cert. den., 399 U.S. 910	4, 5, 7
United States v. Neves, 269 F.Supp. 159 (S.D. N.Y. 1967)	6
United States v. Remolif, 227 F.Supp. 420 (D.C. Nev. 1964)	6, 11
United States v. Sclasani, 265 F.2d 408 (2nd Cir. 1959), cert. den., 360 U.S. 918	9
United States v. Turzynski, 268 F.Supp. 847 (D.C. Ill. 1967)	10
United States v. White, 417 F.2d 89, 91 (2nd Cir. 1969), cert. den., 397 U.S. 912	7
Zacher v. United States, 227 F.2d 219 (8th Cir. 1955)	9

UNITED STATES CONSTITUTION	
Fourth Amendment	3
Fifth Amendment	3
Sixth Amendment	3

RULES OF THE UNITED STATES SUPREME COURT	
Rule 24	1

IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. 672

JOE H. TONAHILL,
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit

---

PETITIONER'S REPLY TO BRIEF OF THE RESPONDENT IN OPPOSITION

Major considerations prompt utilization of the privilege granted to the Petitioner by Rule 24, paragraph 4, of the Rules of this Court. By order dated October 12, 1970, this Court denied application for writ of certiorari to review *Prudden v. United States*, 424 F.2d 1021 (5th Cir. 1970). The brief in opposition relies heavily on that

ruling but ignores and, thus necessitates explanation of, significant and controlling distinctions between *Prudden* and the decision subject to review here.

As Petitioner has previously pointed out (Pet., p. 6), a major distinction between *Prudden* and this case is that in *Prudden* the government, as appellant, placed in issue the sufficiency of the evidence to sustain the trial court's fact findings of fraud, trickery and deceit while in this case the judgment of the trial court recites that counsel for the government admitted that the behavior of the Internal Revenue agents constituted fraud, trickery and deceit (Pet. A-5), and neither that fact finding nor any other upon which the district court decision rested was placed in issue on appeal.

The court of appeals decided *Prudden* by setting aside the district court's ultimate fact finding of fraud, trickery and deceit and by concluding that the evidence had been voluntarily and knowingly given by the taxpayer to the agents. In the decision here before this Court, an entirely different issue had been raised. The position of the government here was that evidence is not inadmissible even though secured from the taxpayer by admitted fraud, trickery and deceit on the part of the revenue agents. The decision in *Prudden* does not support such an argument, nor does this Court's denial of certiorari in the *Prudden* case indicate that a like ruling should be made here. Indeed, denial of certiorari in the instant case could cause the lower courts to conclude, as the Government contends, that agents can use fraud, trickery and deceit, immune from the right of suppression.

Although the brief in opposition filed in this Court contains no reference thereto, the government, as appel-

lant in the Court of Appeals admitted to "deceit practiced by the agents in emphasizing the civil, and de-emphasizing the criminal, aspects of the case" (Brief, p. 7). The deceit was defended by contentions that "deceit practiced by law enforcement officials, in and of itself, is not enough to warrant suppression of confessions or admissions; confessions and admissions are not rendered inadmissible merely because they are procured by deceit, trickery or fraud" (Brief, p. 7); "deceit, in and of itself, is not enough to warrant suppression of a confession" (Brief, p. 19); "the use of strategems, trickery, misrepresentations and deceit by an investigator is neither unconstitutional nor illegal per se"; and that "a confession is not rendered inadmissible merely because it was procured by deceit, trickery or fraud" (Brief, p. 20). Even in *Prudden*, the Fifth Circuit "explicitly reject[ed] the government's contention that the agents were free to use fraud, deceit, or trickery," and pointed out that "in cases where the IRS agents are obtaining consent to examine documents, they cannot gain such consent by affirmatively misrepresenting the nature of the search" (424 F.2d 1032, Ftn. 21; Pet. A-37). In the decision here subject to review, the court, because of the government's admissions, necessarily must be found to have held that the absence of any warning whatsoever may be coupled with fraud, trickery and deceit of the agents.

It should be pointed out that Petitioner's motion to suppress was grounded on the Fourth, Fifth and Sixth Amendments to the Constitution of the United States, any one of which should have been grounds for suppression. The Government, on the other hand, argues in effect that the Fourth Amendment rights do not apply, and that

a taxpayer has no right to Fifth Amendment protections unless he can also claim Sixth Amendment protections. If taxpayer is not in custody, he need not be warned of his right to counsel under the *Miranda* rule; therefore, according to the Government, he need not be warned of his right to keep silent. The Government's contentions are inconsistent with the vast majority of tax cases concerned with the issue.

The courts seem to say that advice as to the right to counsel becomes imperative only when the defendant is under custodial interrogation. The right to be warned that a person might be incriminating himself — that a criminal investigation is being conducted and he has a right to keep silent — these warnings are required whether or not custodial interrogation is involved. The distinction, while not articulated, is obvious. A suspect questioned in his own store, if he is warned that a criminal investigation is in process, has at least the freedom to telephone his lawyer and remain silent until his lawyer arrives. If he is in custody, the authorities must inform him of his right to telephone.

The distinction is nowhere more valid than in the case here before the Court. Petitioner, being a lawyer, would have known immediately to call a lawyer experienced in tax matters and to remain silent until the lawyer arrived if he had been told he was being investigated for the commission of a crime. His knowledge in this regard would be of no benefit to him unless he also knew that he was involved in a criminal investigation. Until he was so informed his knowledge of what to do in a criminal investigation was worthless to him. The decision below stands alone in presuming a waiver of

constitutional rights and holding admissible evidence obtained from a taxpayer without any warning whatsoever. Whether the warning is required by *Miranda* and *Escobedo*, it is nevertheless required.

Each of the decisions cited by the government, as well as many other decided cases, is, therefore, clearly reconcilable with the established general rule that the advice as to the privilege against self-incrimination is not dependent upon custodial investigation. The decision below does not purport to find that Petitioner voluntarily and understandingly waived his constitutional rights; instead, the decision assumes waiver by placing upon the taxpayer the burden of proving circumstances constituting an absence of waiver. None of the cited cases so holds; all indicate that the warning against self incrimination must be given, and that the Government has the burden of proving that the information was obtained lawfully—after due warning, and without fraud, treachery and deceit.

In *Grant v. United States*, 291 F.2d 227 (2nd Cir. 1961), *vacated on another ground*, 369 U.S. 401, the taxpayer had been warned at least to the extent that an Internal Revenue agent had told him "that what they were trying to do was to put him in jail" (291 F.2d 229) and had been informed by another agent that "you don't have to give me this information" (291 F.2d 228). Petitioner was neither so warned nor so advised. Moreover, in *Grant* the trial court had found "that there was nothing to show any affirmative misrepresentations, fraud, deceit, or scheme to defraud" while the trial court in the case at bar found, and the government admitted to, affirmative fraud, trickery and deceit on the part of the Internal Revenue agents.

In *United States v. Remolif*, 227 F.Supp. 420 (D.C. Nev. 1964), the trial court found that "defendants were informed by agents of the Internal Revenue Service of possible criminal implications in the investigation"; that "consent . . . to the examination of the books and records . . . was voluntarily and understandingly given" and that "consent was not obtained by fraud or misrepresentation" (227 F.Supp. 442). Contrary findings were made by the trial court here. In *United States v. Neves*, 269 F.Supp. 159 (S.D.N.Y. 1967), the court found that there was no fraud and that the Internal Revenue agents had "warned the defendant that anything he said could be used against him" and advised that "he did not have to answer questions or submit records tending to incriminate him" (269 F.Supp. 160). Here the government has admitted fraud and conceded that no warnings of any sort were ever given to the Petitioner. In *United States v. Prudden*, 424 F.2d 1021 (5th Cir. 1970), *cert. den.*, No. 453, this Term, it was the taxpayer himself who had initiated the contact with the agents for the Internal Revenue Service. In summarizing the facts "most favorably to the taxpayer," the court there pointed out that "Prudden telephoned Lexow at the Palm Beach office of the Internal Revenue Service from his home in Connecticut, stating that he was a director of FCA. He inquired if Lexow's examination was to cover FCA alone or its subsidiaries also, and further asked if the examination was routine. Lexow replied that the examination would cover both FCA and its subsidiaries and that it was not routine" (424 F.2d 1022, Pet. A-17). Not even that minimal warning was given to Petitioner by the revenue agents who approached him. Moreover, the taxpayer in *Prudden* consistently "refused" to produce certain records for the

government agents (424 F.2d 1021, Pet. A-20), thus establishing his knowledge that he was not required to provide evidence and his voluntary action in making other records available.

In *Morgan v. United States*, 377 F.2d 507 (1st Cir. 1967), the taxpayer "was warned by the agents of his right to remain silent, and that anything he said might be used against him. . . . The defendant makes no assertion, nor could he, that he was not free to walk out of the internal revenue office at any time. Nor is there any suggestion of trickery or fraud." In *United States v. White*, 417 F.2d 89, 91 (2nd Cir. 1969), *cert. den.*, 397 U.S. 912, the taxpayer was told "that he was not required to answer any questions or turn over any personal records." In *United States v. Mancuso*, 378 F.2d 612, 619 (4th Cir. 1967), *cert. den.*, 390 U.S. 955, the agent "advised the defendant 'that under the Constitution of the United States he may refuse to answer any question the answer to which will tend to incriminate him' "; moreover, the taxpayer had been convicted under the net worth theory rather than upon the basis of evidence which he himself had provided to the agents. Similarly, in *Agoranos v. United States*, 409 F.2d 833 (5th Cir. 1959), *cert. den.*, 396 U.S. 824, the taxpayer had been convicted under the net worth theory rather than upon the basis of evidence asserted to have been unconstitutionally obtained from him. In *United States v. Miranda*, 422 F.2d 150 (6th Cir. 1970), *cert. den.*, 399 U.S. 910, the circuit court affirmed the trial court's holding based upon findings that the agents had warned the taxpayer that he "was not required to answer any questions . . . or give any information," that the taxpayer stated that he understood, and that "all

statements made and all documents delivered were voluntary acts of the appellant and were not induced by stealth, trickery or misrepresentation" (310 F.Supp. 217, 220-222).

In *Cohen v. United States*, 405 F.2d 34 (8th Cir. 1968), *cert. den.*, 394 U.S. 943, the taxpayer was advised that he need not answer any questions which tended to incriminate him"; the taxpayer said "that he understood"; the "warning was repeated"; the taxpayer received "a letter which told him that he could bring an attorney". In *Feichtneir v. United States*, 389 F.2d 498 (9th Cir. 1968), after the case was referred to a special agent, "appellant obtained counsel who was present at subsequent conferences"; objection to "the admission of exhibits obtained by the special agent from appellant with his counsel's permission is groundless." In *Hensley v. United States*, 406 F.2d 481 (10th Cir. 1968), the "only evidence obtained from the appellant which was introduced at the trial was corporate records and a natural person may be required to furnish the corporate records irrespective of the fact that such records might tend to incriminate him; . . . no evidence was used by the prosecution which an accused, fully aware of his constitutional rights, could have prevented the government from obtaining or introducing."

To this effect also are *Schlinsky v. United States*, 379 F.2d 735 (1st Cir. 1967), *cert. den.*, 389 U.S. 920; *Mansfield v. United States*, 381 F.2d 961 (7th Cir. 1967), *cert. den.*, 389 U.S. 1015; *United States v. Maius*, 378 F.2d 716 (6th Cir. 1967), *cert. den.*, 389 U.S. 905. See also *United States v. Agy*, 374 F.2d 94 (6th Cir. 1967), holding that statements made before warning were inadmis-

sible: *Kohaisu v. United States*, 251 F.2d 898 (9th Cir. 1965), *cert. den.*; 384 U.S. 1011, holding that statements admissible on the basis of warning shortly after criminal investigation instituted; and *Evans v. United States*, 377 F.2d 535 (5th Cir. 1967).

In *United States v. Sclasani*, 265 F.2d 408 (2nd Cir. 1959), *cert. den.*, 360 U.S. 918, the Court of Appeals affirmed the trial court's finding that the taxpayer's "original permission was freely given in response to a fair and accurate warning" and that there was no fraud or trickery on the part of the government's agents (265 F.2d 415). The conviction was upheld upon the basis of "net worth independently proved by the government" (265 F.2d 412).

In *United States v. Frank*, 245 F.2d 284 (3rd Cir. 1957), *cert. den.*, 355 U.S. 819, the government proved its case by the bank deposits-expenditure method and for corroboration used the net worth method. The trial court had found that no fraud was practiced by the government agents (151 F.Supp. 864).

In *Biggs v. United States*, 246 F.2d 40 (6th Cir. 1957), the court found that the evidence was "voluntarily given to a revenue agent in a civil tax investigation without promise of immunity and in the absence of fraud and misrepresentation" (246 F.2d 44).

In *Zacher v. United States*, 227 F.2d 219 (8th Cir. 1955), the court quotes the warning which was given to the taxpayer and his response that he "felt free to answer these questions". (227 F.2d 225). The court therefore found that the evidence had been voluntarily and knowingly supplied by the taxpayer.

No case cited by the government denies a motion to suppress, or approves a conviction upon the basis of, evidence secured from the taxpayer without warning or indication of knowledge and understanding of criminal prosecution on the part of the taxpayer. Where the taxpayer, as here, was never advised of his right to remain silent or told that a criminal investigation had been instituted, the courts have held that the evidence should be suppressed. *United States v. Turzyński*, 268 F.Supp. 847 (D.C. Ill. 1967); *United States v. Harrison*, 265 F.Supp. 660 (D.C.N.Y. 1967). Here the absence of warning was coupled with admitted fraud, trickery, and deceit.

In its brief in opposition in this Court the government does not continue its previous defense of fraud as a means of securing evidence, but neither does it attempt to retract the prior admissions of fraud. Instead, it seeks to defend the decision below by a charge that Petitioner has confused findings of fact with conclusions of law in his claim that the decision below rests upon an unwarranted rejection of the district court's findings of fact. The findings of fact to which the argument had been directed were, of course, those in which the trial court found "affirmative fraud, trickery and deceit" (Pet. 22-23). No authority whatsoever is cited for the contention that "affirmative fraud, trickery and deceit" are "conclusions of law." The government's assertion to that effect is contradicted even by the decisions relied upon in other arguments. For example, in *Biggs v. United States*, 246 F.2d 40 (6th Cir. 1957), the court explicitly held that "[w]hether the books were voluntarily surrendered by the appellant or were obtained under a promise of im-

munity or through fraud or misrepresentation on the part of the Government is a *question of fact*" (246 F.2d 44; emphasis added). In *United States v. Remolif*, 227 F. Supp. 420, 425 (D.C. Nev. 1964), although the motion to suppress was denied, the court, because of a dispute as to whether or not fraud, misrepresentation or trickery vitiated the consent, ordered the issue to be submitted to the jury. In *Prudden*, upon which the government heavily relies on all other points, the court, citing cases on the "clearly erroneous" test, reached the conclusion "that the ultimate *fact finding*—fraud, trickery and deceit by the agents—is a mistaken one" (424 F.2d 1031; Pet. A-35-36), and, after an exhaustive review of the evidence relied upon by the taxpayer (424 F.2d 1031-1035; Pet. A-35-44, emphasis added), set aside the "fact determination" of the trial court.

The decision below, thus, sets aside in a trial court judgment that which the same court had previously designated to be a "fact finding—fraud by the agents." That ruling was made without regard to the "clearly erroneous" test and in spite of the fact that the government had not contested the trial court findings of fact. Here the trial court not only found fraud on the part of the agents but also found that "[e]ven the Government's counsel admits that such behavior [that previously described in the opinion and nowhere disputed by the government either in the Circuit Court or in this Court] constitutes fraud, trickery and deceit" (Pet. A-5).

In essence, therefore, the government, by its brief in opposition, is here seeking this Court's denial of certiorari and, thus, the opportunity to base prosecution of Petitioner

on evidence not only obtained without warning but even admittedly secured by "fraud, trickery and deceit" on the part of the revenue agents.

Respectfully submitted,

SANDER W. SHAPIRO
P. O. Box 1148
Austin, Texas 78767
A/C 512 472-8442
Counsel of Record

CLARK, THOMAS, HARRIS,
DENIUS & WINTERS

MARY JOE CARROLL
P. O. Box 1148
Austin, Texas 78767
A/C 512 472-8442
Of Counsel